

GOVERNMENT IN THE SUNSHINE

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

H.R. 11656

GOVERNMENT IN THE SUNSHINE

MARCH 24 AND 25, 1976

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GOVERNMENT IN THE SUNSHINE

WEDNESDAY, MARCH 24, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:40 a.m., in room 2226, Rayburn House Office Building, Hon. Walter Flowers [chairman of the subcommittee] presiding.

Present: Representatives Flowers, Mazzoli, Moorhead, and Kindness.

Also present: William P. Shattuck, counsel; and Alexander B. Cook, associate counsel.

Mr. FLOWERS. We will call the meeting to order this morning. We are pleased to have as our first witness our distinguished colleague from Florida, Mr. Fascell. Dante, we certainly welcome you as one of the primary movers of this legislation in the Government Operations Committee and know that you have a prepared statement which you wish to include in the record. And it will be so accepted. We will appreciate you're giving us the salient points as you see fit.

[The prepared statement of Hon. Dante B. Fascell follows:]

STATEMENT OF HON. DANTE B. FASCELL, A REPRESENTATIVE IN CONGRESS FROM THE
STATE OF FLORIDA

Mr. Chairman and members of the subcommittee, I am delighted to have this opportunity to speak on behalf of the Government in the Sunshine Act.

I urge the subcommittee to swiftly endorse this legislation to open the deliberations of Executive Branch agencies to the public. Secrecy in government must be eliminated. The confidence of the American people in their government, which recently declined to a record low, must be restored.

There is no better way to assure the people of this nation that their government is working faithfully on their behalf, than through opening the processes of government to full public scrutiny. That is the purpose of the legislation before you.

On March 19, 1975, I introduced H.R. 5075 to provide that meetings of governmental agencies shall be open to the public. Subsequently, identical bills were introduced with 38 co-sponsors. A counterpart bill, S. 5, was introduced in the Senate.

On July 31, 1975, an amended version of S. 5 was reported unanimously by the Senate Committee on Government Operations, and that bill was approved by the full Senate on November 6, 1975, by a vote of 94-0. H.R. 11656, a bill refining the Senate language, was approved by the House Committee on Government Operations by a vote of 32-7. This is the measure before the subcommittee.

Very few people would argue with the principle of government in the sunshine. Actually, this is the cornerstone of our democracy. Without public access to information on governmental actions, there can be no adequate basis on which individual citizens can form judgments and cast their votes for those who exercise the functions of government.

To the extent that secrecy exists in government, I believe that by and large it is the product of inertia and the following of what seems at first glance to be the easiest expedient—that of withholding information from the public. After all, if the

public does not know what happened or what has been done it cannot fault the officials who are responsible for such actions. Thus, the officials involved may feel they can be safely immune from criticism if the results are not favorable.

Yet, in the long run, such secrecy causes more problems than it solves. Eventually the truth usually leaks out, and when this happens after-the-fact, it breeds public distrust and condemnation which may be directed against officials other than those responsible for any misdeeds. The whole government suffers when our people perceive that it is working secretly against them.

What we need is a means to shatter the complacency of officials who needlessly follow practices of secrecy and make it so difficult to operate in such a manner that a policy of open government becomes the easy way out. Then we will have true "government in the sunshine" as officials learn that opening the decisionmaking process to the public is not only harmless, but salubrious.

In seeking to open the conduct of public business by Federal agencies, we in the Congress are asking no more than we have already imposed on ourselves. In 1973, the House adopted legislation which I co-sponsored amending the rules to strengthen the requirement for open hearings and open committee meetings including meetings for the markup of legislation. Prior to that action, 56 percent of House hearings and meetings were open to the public in 1972. In contrast, under the stronger open meetings rule adopted in the 93rd Congress, 92 percent of all House committee hearings and markup sessions were open to the public in 1974.

I have seen no drastic adverse consequences as a result of the new Congressional open meetings policy. Instead, the legislative output has been stepped up, and we can point with pride to the fact that any member of the public can find out virtually all he wants to know about Congressional actions, if not more than he wants to know.

The legislation before you would take similar action with respect to Federal agency meetings. Some 50 agencies headed by more than one governing member, appointed by the President and subject to Senate confirmation, come under its provisions. These include such agencies as the Civil Aeronautics Board, the Federal Communications Commission, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Securities and Exchange Commission, and others.

H.R. 11656 sets forth the policy that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal government. It is the purpose of the Act to provide the public with such information while protecting the rights of individuals and the ability of the government to carry out its responsibilities.

I would like to stress that this legislation has undergone the most careful consideration and scrutiny in the Committees on Government Operations in the House and Senate. Numerous changes have been made in order to accommodate any legitimate objections of the Executive Branch and the agencies involved.

Some would say we have gone too far in meeting these objections. One of the primary changes sought by the agencies dealt with the bill's effect on the Federal Reserve Board and Securities and Exchange Commission, which deal with the regulation of financial institutions. These agencies in effect sought a complete exemption from the requirement that meetings should be open to the public.

We provided a blanket exemption for the financial agencies that permits them to close meetings which in their judgment involve information whose disclosure would be likely to lead to significant financial speculation or to significantly endanger the stability of a financial institution. Moreover, the House bill goes even further than the Senate version, which would permit closing only for "serious" financial speculation. I believe this major exemption should be more than enough protection for any reasonable concerns of the Federal Reserve Board and S.E.C. In addition, the Senate bill provided protection only until an action on the matter involved was taken by the agency. We eliminated this requirement in the House bill approved by committee.

Also, the Senate bill ends protection of financial agency information once it is released. As a concession to the Federal Reserve Board we applied this only to exemption clause 9(B) which affects all agencies, not to clause 9(A) which involves only the financial regulatory agencies.

We also agreed to the financial agencies' request that in adjudicatory proceedings, the issuance of a subpoena would be protected.

Another change requested by the Federal Reserve Board was to delete the requirement of a summary or paraphrase of material deleted from a transcript. We provided in our committee bill that the agency need only give the reason for the deletion and the statutory basis.

In response to the Office of Management and Budget, we provided 40 days to answer court actions, instead of 20 as provided in the Senate version.

Another change made by the House committee was to add an exemption for Trade Secrets. This follows the language in the Freedom of Information Act.

Throughout the bill, the House committee made numerous minor and technical improvements in the drafting, so as to provide clear and workable statutory language. I feel that the measure reported can be relied upon as both effective and fair.

I regret that a number of inaccurate criticisms were made in the committee report's minority views. One called it a "lawyer's dream" although the bill does not guarantee attorney's fees paid by the government where a plaintiff prevails, as claimed. Instead, the bill leaves this in all cases to the discretion of the judge.

Another criticism was made of the provision under which legal actions may be brought in locations other than the place where the agency is located. This has no merit, since a similar situation already exists under civil procedure generally. The Freedom of Information Act and Privacy Act both have similar venue provisions.

There was also a discussion of an endless series of meetings to close portions of a previous meeting. This is also inaccurate, as no such meetings would be required. Ordinarily such actions could be taken by a notation procedure, under which an agency would pass a ballot around to its members instead of requiring them to meet in all cases.

I repeat that the Committee on Government Operations has carefully listened to all agency and Executive Branch comments on the legislation and has responded by making corrective changes wherever they were justified. In view of this careful consideration, I ask that you act as soon as possible to endorse this important measure so that it can be brought before the House for a vote as reported by the Committee on Government Operations.

TESTIMONY OF HON. DANTE B. FASCELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. FASCELL. Thank you, Mr. Chairman, and members of the committee. I do have a prepared statement, Mr. Chairman, which I'll submit for the record and then I'd like to proceed for a moment or two, just to set the groundwork before you here of specific testimony from the agencies who have further comment with respect to this legislation.

And I can't remember which number of this form it is now that we have been through this same exercise and I don't say that in any derogatory sense, Mr. Chairman. This is a very important subcommittee and certainly the Judiciary is one of the more important committees in the whole Congress.

I just simply state that the process has been a long one and a thorough one and there's been an awful lot of consideration given to every conceivable point involving all aspects of this bill and that this is form No. 10, or somewhere down the line, in which we've had a repeat of a one-act play.

But nevertheless, obviously the opposition is serious or they just wouldn't go to all of this time and effort. I think they've overreacted—is my own feelings on it. And I respectfully submit to the committee that you'll find in the legislation, on careful review, after having heard their arguments against it, that we've done just about everything possible to protect them and to meet their legitimate complaints, except to write in the bill that they're not covered by it, which is really what they want.

The whole concept, of course, is openness in government and I don't think I have to dwell too long on the idea that there's enough frustration and cynicism around the country that we don't need to add to it.

And the major purpose of this bill is simply to bring the executive agencies into some kind of counterpoint—what we've already done in the Congress. I was one of the principal sponsors of the congress-

sional effort. I know that a great many members of this subcommittee supported that effort in opening up the committees of the Congress.

The general complaint is exactly the same, which is that you are going to hinder and overburden our ability to carry out our work and that is not in the public interest. Without oversimplifying the argument, Mr. Chairman, all we can say to that is "hogwash." The evidence doesn't bear that out. It might bear it out after you've had some experience on this bill. I don't know.

But right now, based on the experience we have, that certainly doesn't hold. We went from something like 50 percent of executive or closed hearings in the Congress to something like 92 percent. And we had all kinds of dire statements made about the inability to articulate, the freedom of thought, the incapacity to write, the public interest would be thwarted, that the lobbyists would take control. All kinds of horrible pictures were painted, just as the agencies have painted horrible pictures about their inability to do their work, to administer to the public, under the provisions of an open concept.

We found exactly the opposite in the Congress. And I would say to this committee that the agencies will find exactly the opposite when they start to work under the terms of this bill. We have done everything to meet the requirements of reasonable administration and yet to provide a maximum of legitimate openness for the public to help dispel this feeling of cynicism and frustration that has enveloped our people who think everytime we meet, we meet in a closed room we're all smoking cigars, cutting up the pie, and in some way finagling the public.

And that's true of the executive agencies more so, because they touch the American people in more aspects of their lives. So they are certainly suspect in every single way. But we found when we opened it up in the Congress—even the conference committees, and I've been on all kinds of conference committees, dealing with all kinds of sensitive subjects. Certainly national security is as sensitive as any of the things that are complained about in here. And we have managed to sit there very frankly, openly, and deal with the subjects that come before us, and I think, to the betterment of U.S. policy.

There's still some argument going around about that, of course, and there probably will be. But I come down on the side that certainly in the field of foreign affairs, where we opened up all of the mark-up sessions in all of the conferences, that we are far better off. My own personal observation is that we've had better attendance.

We've had more direct and reasoned input in terms of comment and study by our individual members. And we've had a better end product. And the extra added benefit is that almost every time we met, that room has been full with people who are interested.

Mr. FLOWERS. There's a process, Dante, that whereby any committee—that Congress can close its hearing by simple majority vote on the specific subject of closing a hearing.

Mr. FASCELL. Well, Mr. Chairman, we've done the same thing in this bill. We have provided a means whereby—and the rules are stated in there—whereby an agency can close its meetings.

And I'll say, without any contradiction—and I think even the agencies agree to this somewhere in the record, if you want to take

the time to go dig it out—that the definition under which they can close their meeting is so broad they can probably close every single meeting.

Certainly that would be true for the Federal Reserve Board and SEC. And I don't know what FTC is doing up here, frankly, and I don't see where they've got any problem at all, since everything they're supposed to do ought to be in the public interest, unless they've got a pending investigation or they're about to take somebody into court. And that's protected under the bill.

But the definitions, Mr. Chairman, when you examine those in the bill—and they're 10 of them—are so broad that the agencies can cover their operation. Then comes the argument, "Well, maybe that's so, but what about these transcripts you're going to require us to keep of the closed meeting?" You know, we ran into that argument around here. Like there's something wrong with the reporter, who has a stenographic record, and makes a full transcript of the comment.

And the argument is made, "Oh, well, some way, when you provide some judicial process, whereby if the meeting is improperly closed and that transcript should ever get out, my God, man, this is just going to tear down all of our financial institutions." That's the theory of the thing.

So what did we do? We said, "All right, we'll do this." First of all, what's wrong with keeping an official record, Mr. Chairman? As an agency of the U.S. Government for the people, should there not be an official record? If this committee were going to go in executive session to mark up a bill on a very sensitive, important matter that couldn't be leaked out, would you want to do that without a transcript, even though the transcript is not going to be released?

Should there not be an official, U.S. Government record that belongs to the people somewhere? If that's not so, why do we have minutes of meetings and Congressional Records and transcripts for all of our hearings and even in our courts?

So, anyway, what about this transcript? What recourse is there? If you can make a case that a meeting was improperly closed and you go into court—the fear that was expressed was, well, some way that transcript would get out and all of those free statements that were made, uninhibited statements—and there the assumption is they're made without basis in fact and just conclusions and that, therefore, this would be bad and libelous or in some other way inhibit the operations of the agency. That kind of testimony or conversation would be out.

The judge would review the transcript in camera and, mind you, this is simply on a case in which the charge is made that the meeting was improperly closed under the law, which I submit, is very tough to make under this particular legislation because it's so broad.

But assuming that it could be made, the judge in camera would examine the transcript. He would decide whether or not any of the information would then be made public, which is the only recourse of the plaintiff. He seeks to make available to the public that information which should properly have been made public.

And so the bill, Mr. Chairman, in answer to your question, responds with an amendment that is now incorporated herein before you, which

says that the judge shall not have any discretion on what information shall be released. That information which would be held confidential under the terms of this bill would still be confidential. The judge wouldn't have any discretion on that.

The only information he could make public—if he made public any—would be that information which would have been properly made public in the first instance.

Mr. FLOWERS. The judge has the power of decision. Therefore, he has the option, doesn't he, as to what is proper and what is not proper?

Mr. FASCELL. That's true. You know, but you've got to——

Mr. FLOWERS. It's the judge's choice, isn't it?

Mr. FASCELL. You know, I rely on these agencies every day, like millions of people, to make decisions. And you know, I can't go with the assumption that there's something wrong with the judicial system, although I've had my arguments with many judges many times.

Mr. FLOWERS. Is this a district judge in the District of Columbia? Is that what the bill provides?

Mr. FASCELL. You've got me now, because we've had so many arguments about this thing, I can't even remember. Yes.

Mr. FLOWERS. Any district judge?

Mr. FASCELL. Any district judge. You know, they wanted to change the venue. That was one of the arguments, you know.

Mr. FLOWERS. Well, you've got the Federal Reserve Board meeting in a number of different areas of the country. And there are other agencies that would be covered here by——

Mr. FASCELL. Why change the present system of the present Federal rules, Mr. Chairman? Why not let the plaintiff bring the suit under the present Federal rules, Mr. Chairman? Why make a specific exemption in this law that this particular kind of action has to be brought in the District of Columbia? It doesn't make any sense.

The U.S. attorney is the one who is going to——

Mr. FLOWERS. Well, you've got me. I'm on your side.

Mr. FASCELL. Yes; I hear you. I'm not, you know, being argumentative. I was trying to address the issue.

Mr. FLOWERS. It might create a little legal business out in the provinces, mightn't it?

Mr. FASCELL. Well, I'll tell you what. I wouldn't want to take one of these cases on a contingency basis, Mr. Chairman, and wind up with a lot of empty words.

Mr. FLOWERS. We appreciate your comments.

Mr. FASCELL. Well, I'd be delighted to go on in detail. Let me just conclude by saying this, Mr. Chairman. We, meaning all of the other committees and myself and the sponsors of this legislation, have worked diligently and have met time after time after time with representatives of the agencies who had some complaints, who by the way, are always for motherhood, but really don't want this bill. And I must say, however, they have negotiated in good faith. They have fought in good faith. They are for the principal, but all of the details of this thing simply don't seem to match exactly unless some way they get out from under this thing. This has been the undercurrent of this thing all along.

You know, we're playing that kind of game. It's a nice waltz and whatnot and frankly I'm delighted to have the opportunity to waltz around once again, but this is what has been happening. Now, all I can say is this. The bill has been carefully considered over a long period of time, Mr. Chairman.

I know this committee will give it careful consideration again, will listen to the complaints that some of the agencies have with respect to this, and then let me conclude by saying this. We have made many amendments in this bill, which will be detailed specifically for you on the record showing the changes in an effort to compromise, to meet more than halfway, in my judgment, some of the issues that have been raised by the agencies.

Mr. FLOWERS. Dante, what was the vote in your committee reporting it out?

Mr. FASCELL. I don't know. We've got it in here somewhere in my statement—32 to 7 or something like that. It came out of the subcommittee unanimously. In the last committee that we went at, I believe—unless the agencies have come up with some new amendment—that everyone of the amendments was argued fully. We met on them many times in the subcommittee, and as I recall it, they were offered in the full committee and debated thoroughly in the full committee.

Mr. FLOWERS. One section of the bill—section 4, is it?

Mr. FASCELL. On the ex parte communication, Mr. Chairman.

Mr. FLOWERS. Ex parte communications, which is substantially identical with a bill that I introduced which is now pending in our subcommittee.

Mr. FASCELL. You've convinced me. I like your bill, Mr. Chairman.

Mr. FLOWERS. It is not that I have any particular pride of authorship because, quite frankly, I didn't draft the bill. But I'm interested in the discussion and the amendments that took place on this section. Was this a matter of heavy discussion in your committee?

Mr. FASCELL. No, sir, Mr. Chairman, not really. As you know, this legislation emanated as a result of an American Bar Association study many years ago that followed the oversight hearings of the Moss subcommittee. It went into the whole question of the abuse by some people of the regulatory process.

And as a result of that—and ex parte communications, telephones, letters, and so forth—the bar association put a special committee together to study the problem. And they came up with the concept of this legislation, which basically said—

Where you have something in the nature of an adversary proceeding, that if you're going to have an ex parte communication, which is really not too good in the first place, at least you ought to let the other side know about it, so if you're going to put some political muscle on them or some other kind of muscle on a regulatory agency, that the adversary would have an equal opportunity to know about it and the public would know about it. So you make the requirement that it be put on the record, which I think is a darn good approach.

Now, basically most agencies are living with that now anyway and this would pretty much codify what the existing practice is. So there hasn't been too much debate on that. There's been an argument over a word or two and this and that and the other.

I didn't draft this legislation either, because basically it came out of that ABA study.

Mr. FLOWERS. But, I mean, your committee recognizes that that's within the jurisdiction of the Judiciary Committee?

Mr. FASCELL. Absolutely.

Mr. FLOWERS. Some of us were talking and we wondered whether we might ought to include a foreign affairs section to the next bill we reported out or something like that.

Mr. FASCELL. Well, I'll tell you what, Mr. Chairman. You'd find it fascinating discussion if a subcommittee is so minded. I'd be delighted any time, in response to requests, to come up here and discuss it, if you think it's really helpful.

Mr. FLOWERS. Of course, that's in jest.

Mr. FASCELL. Yes; I know.

Mr. FLOWERS. Do you all have any questions of the distinguished gentleman? Carlos, could you begin at this point and then we'll move on to the other members.

Mr. MOORHEAD. In your hearings, were there any major points that were objected to by the agencies, which you were not able to resolve?

Mr. FASCELL. Well, the main one that I can recall was the question of whether or not the Federal Reserve Board and the SEC would be required to keep a full transcript of those meetings which were closed. They just don't want to under that provision of the law, period.

Mr. MOORHEAD. You required that they keep a full transcript, then?

Mr. FASCELL. Yes, sir, on those meetings that are closed.

Mr. MOORHEAD. And were there any requirements as to what was to prevent—

Mr. FASCELL. They're not worried about meetings that are open, in other words.

Mr. MOORHEAD. Was there any requirement as to what would be done with the transcripts or who would have access to them?

Mr. FASCELL. The only recourse with respect to the transcript is a judicial proceeding in which the plaintiff would have to allege that the meeting was improperly closed and that the information therein contained should really be made public. And that's where they come down and say, you know, "If that ever happens, it'll destroy our whole operation," or "in some way make it more difficult for us," or "we won't get the right kind of input." They can speak for themselves on that a heck of a lot better than I can.

But basically that's the major issue as I see it.

Mr. MOORHEAD. Can you think of any other major issues—I know we'll get the other side from the agencies, but I want your point of view on these things before we hear from them.

Mr. FASCELL. No; I think basically that's pretty much where we are, you know, because we've expanded the definition for "exemption" so large that I think they're all out from under it, if they want to exercise it properly, and I'm sure they will.

Mr. FLOWERS. Dante, if I might, the plaintiff's counsel wouldn't have access automatically to the transcript but rather the judge—I mean, they go to court and the judge then would look at it in camera?

Mr. FASCELL. Right.

Mr. FLOWERS. He would decide—if he said, "no," that's the end of it—

Mr. FASCELL. That's right.

Mr. FLOWERS [continuing]. Unless an appeal could be handled.

Mr. FASCELL. Right.

Mr. FLOWERS. Is there any process for an expedited appeal there or are we talking about—

Mr. FASCELL. We've got something in the bill. I don't remember the details of it, Mr. Chairman.

Mr. FLOWERS. Mr. Mazzoli?

Mr. MAZZOLI. Mr. Chairman, I have no specific questions. I think that the gentleman has brought a very important area of modern-day practice to try to hopefully revive a little public interest in the matter of dealing with political action in the executive as well as the legislative branch, and I think our open meetings, including our open caucuses, have helped allay some of the fears that a lot of deals are being made and concluded that way.

But I would like to ask the gentleman sort of aside here—it's very interesting that he and the gentleman from Florida, Mr. Chiles, and all of the other ones label these bills "The Government in the Sunshine." And I wonder, is there anything—

Mr. FASCELL. I can't take credit for that. I wish I could. I don't know who started that one.

Mr. MAZZOLI. Given the fact that Florida is full of sun, is there some kind of a little collusion—

Mr. FASCELL. Yes; I guess so, because we went through all of this stuff down there with the State law, you know. We went through all of the—

Mr. FLOWERS. I think we can assume that nobody from California gave it that—

Mr. MAZZOLI. Yes; I was going to say, they wouldn't voluntarily. Thank you. I appreciate the gentleman's contribution.

Mr. FLOWERS. Mr. Kindness?

Mr. KINDNESS. Thank you, Mr. Chairman. Would you care to comment on why the bill is designed so as to include only the collegial agencies—those with collegial bodies heading the agencies? Do you think the principle should be broader or shouldn't be?

Mr. FASCELL. Well, I'm not ready to say that it should or should not be at this point. I think it would be very important for us first to get experience under this to see whether or not it can really legitimately be applied to other agencies.

But right now the theory is that if you have two people or more making a decision under the authority of law affecting the public—or taking action—that to the greatest extent possible within the concepts of this bill that that process ought to be opened up. That's the theory of it, you know.

So you're not getting to the single head yet in any way.

Mr. KINDNESS. That would be consistent with that reasoning, then, that it is kind of starting with one segment of the governmental function. Would it be consistent with that reasoning to be specific in the bill by enumerating the agencies that are intended to be covered?

Mr. FASCELL. Well, we've been through that fight, you know, about why wouldn't you want to enumerate the agencies. And you've got two basic reasons for that, that I can see. One is, first of all—you've got consistency with the present manner of dealing with that definition in the laws now, where they are not enumerated.

And the other is that in the event that you've got other agencies subsequently that might come under the general purview of this bill, you'd have to have general statutory revision to bring them in.

And then finally there's my own kind of suspicion—and we all have these things, you know. I wonder why they keep wanting to enumerate the agencies. I feel like maybe I've overlooked something. I don't want to take that chance that maybe I've overlooked something. I might not be that smart, so why not just incorporate them by general definitions rather than by specific title?

Mr. KINDNESS. Maybe the gentleman is inferring that there are too many agencies around and that we don't even realize that they are there?

Mr. FASCELL. I don't know. That's probably true and it's probably our fault. We've created them.

Mr. KINDNESS. Well, what I'm really getting at is—

Mr. FASCELL. But basically that's it, you know.

Mr. KINDNESS [continuing]. I sort of share the feeling that the intent of the bill seems to be to aim at a particular category—

Mr. FASCELL. By definition, right, rather than by name of title.

Mr. KINDNESS. And, if I can complete the thought, we ought not to be going beyond what's intended. And in order to be specific about it, I can't think of any way that is clearer and would avoid litigation better than enumerating the agencies. In other words, I think it is not an offensive concept to enumerate them.

Mr. FASCELL. I just—I don't want to say that I agree, all right? But I just—it just seems to me that the broad general definition is the best way to approach this matter. If the concept is good for 17, 18, or 19 specifically designated agencies, why isn't it good for 20 or 21?

Why require a specific enumeration under those circumstances? It has held up before in all of the other laws that we use this kind of approach on. We haven't had any unwarranted or burdensome litigation over the issue. So, you know, it's not a big deal.

It just seems like a better approach to be general rather than specific.

Mr. KINDNESS. All right, thank you.

Mr. FLOWERS. Thanks, Tom. Dante, we have now—our friend from New York, Ms. Abzug, came in while you were orating. Bella, why don't you come forward and sit down—why don't you stay there, Mr. Fascell? There may be some points that she'd like to make that might stimulate some further questions.

Mr. FASCELL. I assure you she can make them better, Mr. Chairman.

Mr. FLOWERS. Well, she may be a little timid about speaking, but we want to hear from her anyway.

Mr. FASCELL. Before I leave, Mr. Chairman, may I express my appreciation to the subcommittee for the prompt response in dealing with this matter and legislation. It has been a long time. We consider it very important.

I would, with your permission—unless you really want me to stay—like to go. I've got a bill pending that's being marked up in another subcommittee and I think I've learned that if I'm not right there, it may not turn out just exactly the way I had envisioned it.

Mr. FLOWERS. You like these open meetings, too, for another reason?

Mr. FASCELL. I sure do.

Mr. FLOWERS. Certainly we excuse you. Thanks for being here, Dante.

Mr. FASCELL. Thank you.

Mr. FLOWERS. We'll be delighted to hear from you——

Ms. ABZUG. Thank you, Mr. Chairman.

Mr. FLOWERS [continuing]. Ms. Abzug. Whatever comments you'd like to make and we've got sort of a short time frame, in order to get as much done today as we can. But please proceed.

**TESTIMONY OF HON. BELLA S. ABZUG, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF NEW YORK**

Ms. ABZUG. Well, I won't read a whole statement, which I originally had intended to do in view of the fact that Dante Fascell, who has just been before you and has worked so hard for years in trying to develop this kind of legislation, has already covered some of the areas.

But as the chairwoman of the subcommittee that has put this bill together and has tried very hard to reconcile all of the differences that existed in proposed legislation as well as some of the objections of the agencies. I thought I'd add certain things to what Mr. Fascell has said.

My subcommittee approved the bill by unanimous vote and then the full Government Operations Committee approved it by a vote of 32 to 7. We had hearings at which we heard from a good number of agencies. We spent 5 days marking it up, at which we had very extensive discussion.

We had a couple of meetings in the full committee for marking it up, as well. We considered many changes that were requested by agencies. And the bill, as you now have it before you, reflects most of those changes.

I heard the discussion, when I came in, and the objections that still are outstanding, that I'm sure you'll hear about from a number of the agencies, are the question of the transcripts, and some questions about venue, attorney fees, and the definition of "meeting."

Now, the purpose of this legislation, as was stated before, is to have meetings of multimember agencies in the executive branch open to the public. I might say, Mr. Kindness, that it's very difficult, if you have a single-headed agency, to have a conversation with yourself in public.

That's why we start out with multimember agency meetings being open to the public rather than all executive agencies. However, we have had testimony from a number of agencies and who believe that it should cover every single agency—and perhaps it will ultimately. But this bill does not do that.

All meetings are to be open to the public, with exceptions that roughly parallel the exemptions that we've provided under the Freedom of Information Act. The bill also prohibits *ex parte* communications to and from agency decisionmakers with respect to the merits of pending proceedings. And it was my understanding that that, in particular, was of particular concern in terms of jurisdiction in this

committee. And, therefore, I'm very happy to have the opportunity to discuss that part of the legislation with you.

The legislation, as was also pointed out by Mr. Fascell, requires that when an agency closes a meeting under one of the exemptions of the bill, it has to make a recording or a verbatim transcript of the closed portion, and must release to the public that part of the recording or transcript that does not contain exempt information.

The second purpose of this requirement is to assure that a citizen has a meaningful remedy when a meeting has been illegally closed; namely, if a court makes a decision that a meeting was illegally closed, the court will be authorized to release any part of a transcript which doesn't contain exempt material. At the same time, any part of the transcript that would be exempt under existing provisions of the bill would not be released.

The purpose of the provision of the bill prohibiting ex parte communications is to insure that agency decisions required to be made on a public record are not influenced by private, off-the-record communications from persons personally interested in the outcome.

The bill as reported provides that a "meeting" is the deliberation of a quorum of agency members, where such deliberations concern the joint conduct or disposition of agency business. The administration proposal originally sought to change this definition to a "gathering" whose purpose is to conduct agency business.

The adoption of either of the changes would open a large loophole in the legislation and would greatly hamper its effective enforcement. If the criterion for coverage is the purpose of the meeting, commissioners would be free to meet for a function with a social purpose, such as lunch, and there conduct all sorts of business and make all sorts of decisions, entirely free from the coverage of the legislation.

Further, it's difficult to prove what was the purpose of a meeting, while it is relatively simply to prove what actually took place at a meeting. The use of the word "gathering," to which we object, instead of "deliberation," would apparently require that the quorum be physically present at a single location, thus excluding from coverage the conduct of a formal agency business over the telephone, which is, as we know, the practice of several agency heads.

It is to be stressed that the bill's definition of "meeting" applies only when a quorum of agency commissioners is present. In addition, the use of the word "deliberations" excludes any discussion of agency business which is incidental or casual in character.

The use of a generic definition for an agency—and I'd like to add to what Mr. Fascell said on this—rather than attempting to list separately each agency that is covered follows a very usual practice in government. The Administrative Procedure Act does it that way; the Freedom of Information Act does it that way; the Privacy Act does it that way. The Administrative Procedure Act has been in effect for 30 years, and I know of no difficulty that has been raised with the generic definition of "agency" under the Administrative Procedure Act. This approach doesn't seem to have created any problem in any of these acts. And I think that the other explanations that were given by Mr. Fascell further answer your question.

I think I already covered part of the question of the verbatim transcript. The other part of that issue, I think, that you might be

interested in is this: Under the scheme of the legislation, the existence of a transcript of a closed meeting is the primary potential remedy for a litigant who proves to a court that the meeting was unlawfully closed. Any court ruling will almost always come after—and long after—a meeting is held, and a plaintiff suing only under this act would not be able to overturn the substantive action taken at an unlawfully closed meeting. The only remedy he or she has then, is to have the transcript of that meeting made available to him or her.

The judicial review provisions of the bill, while permitting and not requiring the court to make the transcript public if the meeting was unlawfully closed, nevertheless as I said before, protects any discrete items contained within such a transcript which are themselves exempt.

The bill provides that a suit under the open meeting provisions could be brought where the plaintiff resides—I heard you discussing the venue question. I don't know what questions you went into with Mr. Fascell. I came in at that point. It provides that a suit under the open meeting provisions can be brought where the plaintiff resides or has his principal place of business, or where the agency has its headquarters. This, too, follows the provisions of the Freedom of Information Act, the Privacy Act, and actions against the United States generally under 28 U.S.C. sec. 1391(c). And the bill has certain provisions for attorneys fees.

Mr. FLOWERS. What are the provisions for attorneys fees? That a prevailing plaintiff would be entitled to attorneys fees?

Ms. ABZUG. It's discretionary. It provides that they can be assessed against an agency of the United States if the plaintiff substantially prevails.

Mr. FLOWERS. What about the costs if the plaintiff does not prevail?

Ms. ABZUG. If he doesn't? Well, we provide that costs can be recovered against the plaintiff if he has sued primarily for frivolous or dilatory purposes, and, again, for an individual agency commissioner, if the court finds that he has "intentionally and repeatedly" violated the open meeting provisions.

Mr. FLOWERS. I guess to an individual——

Ms. ABZUG. Agency commissioner.

Mr. FLOWERS. OK. There was some mention there about—the Administrative Procedures Act has a time limitation on it. Was there any discussion about placing in this legislation a time limitation for the effectiveness of it? This subcommittee has reported out, and the full committee has, just approved some significant legislation on congressional review of administrative rulemaking. We thought it would be well to give it a reasonably long life—three Congresses, 6 years—but require an expiration date so that it would make us look at it again at that time to decide whether it was worth extending or not.

Was there any discussion or thought about that in connection with this legislation?

Ms. ABZUG. No; you mean making this whole legislation sort of experimental?

Mr. FLOWERS. Giving it a time limitation, right.

Ms. ABZUG. No, no, no.

Mr. FLOWERS. I wouldn't say "experimental," but I think the launch pad for that would be the fact that many, many people are coming

to feel that the Government piled program upon program without a view toward really reviewing those programs at any time with any sort of an objectivity.

I don't know that this type of change in current practice would call for that or not. But I don't think it is out of line to consider that in connection with anything.

Ms. ABZUG. Well, yes, we can have conditional legislation every day, if we wanted to. I don't agree with that approach. First of all, we're not involved here in legislation which makes a large financial commitment about an uncertain program or an uncertain plan. We're talking about a policy of opening up government meetings to the public. If for any reason, in the process of developing the rules or the legislation on that, one finds that certain aspects of the legislation are not workable or one finds that certain aspects of the provisions for enforcement are either not sufficient or too onerous, there's always a way to correct this by amendment—change the legislation by amendment.

And I think that for this kind of legislation, that would be a more appropriate legislative process than having a conditional piece of legislation or an experimental piece of legislation. The same concerns, I think, were expressed when we originally enacted our rules in the House opening up our own meetings.

We have the right and the power to amend rules and amend legislation that we pass and we're dealing with process here. And I think when you're dealing with process, we can do that. Now, the FOIA—let me give you an example, as chairwoman of my subcommittee. We passed the Freedom of Information Act in 1966. Then we had a process, a decade of practice under the Freedom of Information Act, and we found that there were certain problems with it.

So we passed various amendments, which are very important amendments, by the way, in the last session of Congress. And I'm sure the same thing will be true about the Privacy Act, which is sort of a new process, which has had some difficulties and on which we are working.

And we can only really judge by the practice what the problems have been, what interpretations have been made by the agencies, how the members find that they're living with it. And we are dealing with it all of the time in my committee, which has oversight as well as legislative responsibility for this area.

And we have, you know, special staff members working on this every day, just seeing how the new act functions, with the administration as well as with the Members of Congress. And we're working on analyzing it all of the time, and whatever problems exist there will be attended to by either administrative regulation or amendments that we will propose.

And I think the "Sunshine" legislation is the same kind of legislation, in the same category. In other words, we will be involved in a very intensive oversight over it.

Mr. FLOWERS. Well, I understand that and I commend the gentlelady for her attitude on these kinds of things. I think that one of the great fallacies of the reform movement, which I certainly generally support, and this sunshine coming in doesn't inhibit legislative process as far as I'm concerned.

But the avid reformers must be willing to be flexible——

Ms. ABZUG. Absolutely.

Mr. FLOWERS [continuing]. After the fact as well as before action is taken.

Ms. ABZUG. No question about that.

Mr. FLOWERS. If we can't achieve that, then we're being foolish and we're just creating roadblocks to effective government.

I've got no further questions really. Our staff wanted to ask one, but we're going to go through the members first. Carlos, do you have any questions?

Mr. MOORHEAD. I didn't have a whole lot to ask about, but I did want to follow up on Mr. Flowers' suggestion that we put a time limit on this legislation. If you try it for 3 years and if it's working, we go forward with it completely. If it isn't and there are areas that need corrections, it comes before Congress so that the corrections can be made.

And oftentimes, if you don't force yourself to come back to something, you find yourself living with a piece of legislation that's far from perfect for a long period of time.

Ms. ABZUG. Well, as I say, we have a very intensive oversight operation on this kind of legislation. We have acted already in this session, again, to propose certain needed administrative remedies and changes even reflective of court decisions as these acts, to which I've just referred, go through the process. I left that out—even the judicial process.

I think this very different from legislation which you might normally suggest for experimental or conditional enactment. We've had a lot of experience in the States on sunshine bills and most of those experiences have been very good and they are much stronger pieces of legislation, I might add, with many more provisions for enforcement and criminal penalties and so on, than this legislation.

And I think we have tried to incorporate all of the concerns of the agencies to the degree that we could without scuttling this bill. I feel that if we mean it, we should have a bill that's a bill without a limitation of time, which kind of gives people the impression that it's just makeshift and we're just experimenting. And I think it discourages the practice under the legislation from being decisive. I really think it has that deterrent, and I'd rather not see that happen.

If an agency sees that we've got a law that's only for a 2-year period or for a 3-year period, there's a tendency to find ways to sort of get around things—maybe not intentionally—and create some problems and some conflicts and some questions that would not normally come up, hoping for different decisions from courts and so on.

I think it encourages an inappropriate application of a piece of legislation. So I very much oppose that and I think most of the members of the committee would, as well.

Mr. FLOWERS. Mr. Mazzoli?

Mr. MAZZOLI. Mr. Chairman, I have no questions. I thank you.

Mr. FLOWERS. Mr. Kindness?

Mr. KINDNESS. Thank you, Mr. Chairman. Ms. Abzug, in this area of what the coverage of the act may be, I recall that when the Administrative Procedure Act was first enacted, there was litigation about what its coverage was, and there will be with this, too.

But would you care to state an opinion as to whether the National Security Council is covered by the bill?

Ms. ABZUG. No.

Mr. KINDNESS. I'm sorry. I phrased my question poorly. Does that mean you'd rather not state an opinion or you don't think it's covered?

Ms. ABZUG. No; I don't think they are because they're not appointed to that position by the President.

You see, I think that the answer to that is that they are appointed to other positions and that they are ex officio members and that the NSC is not a subsidiary of a covered agency. And I'm looking at section 552b(b) which gives us the definition—I don't know if you have the act in front of you, I mean, the bill—but in any case the term "agency" means "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate."

I think the definition itself is clear. I mean, I had to stop and think for a minute. I think the definition gives you an answer for almost any agency that you have. I don't think there's any problem with the generic definition.

Mr. KINDNESS. In that specific case, the reasoning there would be that the people who serve on that Council, the National Security Council, are appointed by the President—

Ms. ABZUG. They serve their—they are appointed to another office. And they serve here as ex officio.

Mr. KINDNESS. And not appointed to such positions?

Ms. ABZUG. That's correct.

Mr. KINDNESS. I submit there may be some room for questions there. But the Domestic Council and the Council on Environmental Quality fall in about the same category, I think, then.

Ms. ABZUG. We would simply take the definition of "appointment" and see how they're appointed.

Mr. KINDNESS. The Joint Chiefs of Staff would be another question. But the thing I'm getting at really is: Are we intentionally covering or not covering some of these groups? I'm getting back to the question of just what is the scope or coverage. I harbor a little concern that we may accidentally include something that is not intended and, on the other hand, accidentally exclude others.

Frankly, I don't see why we, under the provisions of the bill, don't include everyone—single-headed agencies do an awful lot of business every day.

Ms. ABZUG. My personal view is not in disagreement. But the general view was, as I described it to you earlier, that the preference was for multiheaded agencies because of the difficulty of covering "deliberations" or "gatherings" of a single person who heads an agency. I think that that might, in the future, be a consideration.

And since this was a view both in the Senate, which has, by the way, passed a version of this bill which is not dissimilar to this, and general testimony seemed to favor that as a whole, we proceeded on that basis.

Mr. KINDNESS. I recognize, of course, the mechanical difference is in the way that single-headed agencies operate.

Ms. ABZUG. Yes, yes.

Mr. KINDNESS. But I think in this bill we are getting into communications with single agency heads as well as —

Ms. ABZUG. Well, the real problem, I think, is this. I think I stated it before. Who does the single head of an agency make decisions of policy with? Theoretically, I would assume that the single head of an agency is the chief decisionmaker. In a multiheaded agency, there are several decisionmakers, who make policy and decisions together. And that's really the distinguishing point that has been made.

You know, as I said, it may require some additional thought as we go along, but this has been the framework and the structure of the legislation as we have been developing it in this body and the other body. I think it has some merit, although I see your point of view and I personally think that it should be more overall, including the single-headed agencies.

Mr. KINDNESS. I'd like to turn to another area of concern that occurred to me in connection with this. There is a difficulty that might be faced, it seems to me, by an agency covered by this bill with respect to some of the exemptions or exceptions.

Let's take the trade secrets exception. And it seems that the duty would be placed on the agency to determine a question of whether it should be disclosed or not, sort of at their peril. They are subject to litigation in two directions. If they make the wrong decision and disclose something that ought not to be disclosed, thus doing damage to the economic interest of some party, they might find themselves in the courts in that direction. But on the other hand, they might even find themselves in court under the review provision for the transcript if they closed a meeting and someone on the other side wants to get access to that trade secret information.

Would you care to comment on that dilemma? It eventually has to be solved by the courts, I guess, and it suggests an additional volume of litigation, doesn't it?

Ms. ABZUG. Well, first let me explain. We have this same provision under the Freedom of Information Act, the same language, the same exemption. Some questions were raised in the course of our full committee markup on this issue. Some proposals for changing this or some considerations have advanced determinations as to what is a trade secret, and so forth, were made.

And I agreed at the time that this area is one that I felt—not only because of the Sunshine Act, but because of some questions on the Freedom of Information Act—we would be very glad to consider separately in the committee, see if we wanted to propose any changes in it. I think Mr. Pritchard of the full committee made some recommendations or expressed some concern and we said that we would try to get into it a little more fully. So there was no opportunity to make sure that we were, you know, narrowing the program, which we don't think we are. We have had this same operation under the Freedom of Information Act that we're proposing here. And we are going to go into it generally to see how it affects all of this kind of legislation. And if we feel there's something very particular that has come up that isn't covered under this exemption, which we feel it is covered by, why, we will be glad to consider it.

Mr. KINDNESS. Thank you.

Ms. ABZUG. I just wanted to say, on the ex parte provisions, which I know the chairman here is most interested in—I've read your bill and I've analyzed our two provisions and they're almost identical, with some language changes. If there were any problems there in language that you felt you'd like to recommend, I'm sure we could work that out on the floor.

As I read your bill and the provisions that were recommended in our bill, I don't think there's any substantial difference. I understood that this was an area that you were most interested in and one of the reasons for the request for the sequential reference. So I've gone over it and I see that they are most similar.

Mr. FLOWERS. Counsel wanted to ask a question and I yield to him.

Mr. SHATTUCK. Thank you, Mr. Chairman. Ms. Abzug, I will not extend this unduly. But on the attorneys fee question that was discussed previously, subsection (i) provides for an authority in a Federal court in any administrative appeal proceeding to inquire into violations of the bill. And then in the following section, which is the attorney fee subsection, subsection (j), there is a provision for attorneys fees for any action brought in accordance with subsection (i).

Would the allowance of attorneys fees in that instance be limited to that portion of the proceeding relating to the closing of the—

Ms. ABZUG. Of course.

Mr. SHATTUCK [continuing]. Proceeding, not in accordance with the other elements raised in the appeal?

Ms. ABZUG. That's correct. It's just on the closing.

Mr. SHATTUCK. So indirectly we wouldn't be providing for attorneys fees in normal administrative appeal?

Ms. ABZUG. Yes; I would think not.

Mr. SHATTUCK. In the case of the allowance of fees against an agency member, since the agency member would, in every case, vote and therefore do it intentionally—and most probably do it repeatedly in that it might be agency practice—would this be the occasion for the allowance of an attorney fee against that member?

Ms. ABZUG. No; he has to know that it's wrong. In other words, as I think I explained earlier, the allowance for attorney fees against an individual agency commissioner can only take place if the court finds that he has "intentionally and repeatedly" violated the open meeting provisions.

Mr. SHATTUCK. Thank you very much. I asked you to make that point because I think that is the intent.

Ms. ABZUG. Oh, yes.

Mr. SHATTUCK. Now, in the provisions relating to rulemaking concerning the closing of meetings, which I believe is (b)(4) of the revised bill, section, it states, "Any agency, a majority of the portions of whose meetings may be properly closed" and so on—"majority of the portions," how would that be computed? Would it be possible to, in advance, predict the majority of portions of a meeting that might be subject to this provision?

Ms. ABZUG. Well, it was our belief that the agency could, in advance, make a good faith estimate.

Mr. SHATTUCK. Now, the committee was contacted by the Nuclear Regulatory Commission, which has interests, I believe, in closing certain meetings.

Ms. ABZUG. Yes.

Mr. SHATTUCK. And they expressed the fear that they might not be able to establish that the majority of the portions of their meetings would be covered, so eligible. Also it was not one of the exemptions—

Ms. ABZUG. Under those conditions they would have to give notice, unless national security requires otherwise.

Mr. SHATTUCK. The exceptions that are provided—and I will not extend this, Mr. Chairman—only relate to exceptions 4, 8, 9, and 10, but do not include the security-type exception, I do not believe.

Ms. ABZUG. No.

Mr. SHATTUCK. I'm not certain whether you—

Ms. ABZUG. That doesn't include that.

Mr. SHATTUCK [continuing]. Considered the Nuclear Regulatory Commission, but it would seem that that would be their interest.

Ms. ABZUG. Well, if they have a problem which would affect other exceptions, then they would have to give a week's notice.

Mr. SHATTUCK. Yes; I mean, that's their only alternative? They would not come under this rulemaking provision?

Ms. ABZUG. No, no, no. But if their notice—I want to make this very clear—would in any way damage the national security, then they don't have to give notice.

Mr. SHATTUCK. Oh, I understand that, yes.

Ms. ABZUG. OK?

Mr. SHATTUCK. Yes; I understand that. I just—

Ms. ABZUG. Page 3, lines 4 through 9.

Mr. SHATTUCK [continuing]. Say they could not utilize a rulemaking procedure for closing under this provision because that particular exemption is not included within this rulemaking authority.

Ms. ABZUG. That's right.

Mr. SHATTUCK. Yes; thank you very much.

Ms. ABZUG. You're very welcome.

Mr. FLOWERS. Thank you, Mr. Shattuck. Thank you, Ms. Abzug. We appreciate your testimony and that of Mr. Fascell.

Our next witness—we're going to call Mr. Robert Lewis, General Counsel of the Federal Trade Commission. Mr. Lewis, I know that you had another important engagement and we have your statement here.

We're going to be limited in time this morning, but perhaps we might hit the salient points and put your statement in the record and you get away to your other meeting and we'll get away to the first quorum call.

It looks like, gentlemen, we might have to pass the other testimony over until tomorrow morning. We're going to have a short time tomorrow morning and I hope we can get started on time. I say this for the benefit of the Securities and Exchange Commission people who are here.

I'm very sorry we're not apparently going to be able to get to you tomorrow morning, but we're aware of your serious concerns, and I'd like to be able to spend more than a few short minutes

with you. And if we could count on you coming back tomorrow, it would be deeply appreciated.

Mr. Lewis, please proceed.

Mr. LEWIS. Mr. Chairman, I might just say at the outset that if one of us will have to be passed over until tomorrow, in any event, there's no way I think at this point I could make this other engagement unless I left right now. If you would want to hear from the SEC now and from me tomorrow morning—

Mr. FLOWERS. We'll substitute them for you, then. How about that?

Mr. LEWIS [continuing]. That may work to the best advantage of all of us.

Mr. FLOWERS. Very good. Why don't we do that?

Mr. LEWIS. I'll be glad to be back tomorrow morning.

Mr. FLOWERS. We'll excuse you and ask these gentlemen to come forward.

Mr. PITT. Thank you.

Mr. FLOWERS. We want to be as accommodating as possible and we apologize for keeping you late here.

Mr. LEWIS. Thank you.

Mr. FLOWERS. We have, then, Mr. Harvey Pitt, General Counsel of the Securities and Exchange Commission. Mr. Pitt, we welcome you certainly and we'll be delighted to hear from you at this time. I'm sure you recognize our time constraints, too, and we'll proceed accordingly. Please do so.

TESTIMONY OF HARVEY L. PITT, GENERAL COUNSEL, SECURITIES AND EXCHANGE COMMISSION, ACCOMPANIED BY JAMES H. SCHROPP, STAFF MEMBER, OFFICE OF THE GENERAL COUNSEL, SECURITIES AND EXCHANGE COMMISSION

Mr. PITT. I do, Mr. Chairman. And on behalf of the Commission, I'm pleased to have this opportunity to present our views on H.R. 11656. At the outset I should say that Chairman Hills, who feels extremely strongly about this bill, had very much wanted to appear before this subcommittee.

When the scheduling was made, we had already arranged to be out of the country for the entire week and it was only because of that prior scheduling that he was unable to be here. But he did want me to express his sincere regrets at not being here personally.

With me is James Schropp, who is a member of my staff in the Office of the General Counsel. In accordance with the chairman's suggestion, I will paraphrase my prepared remarks. We have also supplied to the staff of the subcommittee, prior statements and testimony, which are available for the subcommittee, and which we hope would be made part of the record of these hearings.

Mr. FLOWERS. So ordered. Please proceed.

[The prepared statement of Mr. Pitt follows:]

STATEMENT OF HARVEY L. PITT, GENERAL COUNSEL, SECURITIES AND EXCHANGE COMMISSION

Mr. Chairman, members of the Subcommittee: I appreciate this opportunity to present the views of the Securities and Exchange Commission on H.R. 11656, the "Government in the Sunshine" bill. Since a primary responsibility of the Commission is to insure appropriate disclosures of material facts by those persons to whom the investing public has entrusted its capital, we are sympathetic to the stated objectives of this bill, which

are to provide the public with "the fullest practicable information regarding the decision making processes of the Federal Government . . . while protecting the rights of individuals and the ability of the Government to carry out its responsibilities."

Nevertheless, the Commission cannot support the enactment of the specific legislation before you, because we believe that, in certain significant respects, this bill would very seriously, and needlessly, disrupt and impede the effective operations of our agency, and would operate contrary to the interests of investors and the public the Commission was established to protect. The Commission previously has testified and otherwise expressed its view on this and predecessor bills, both before the Senate and the House of Representatives Committee on Government Operations. I ask that these materials, which previously have been furnished to the Subcommittee, be made a part of the record of these hearings.

The Commission believes that the infirmities in the bill can be cured, particularly if the bill is modified to reflect an attitude that Governmental agencies would, in good faith, attempt to implement Congressional policy reflected in this legislation and not frustrate its requirements by improper means. Many of the bill's present procedures also are overly cumbersome, without providing any real benefits to the intended beneficiaries—the public. While the bill may be intended to allow individual members of the public to learn what their government is doing, in actual practice it is unlikely that the members of the public will be able to observe many, if any, meetings first hand, here in Washington. As things now stand, it is essentially only the special interests—those that can afford full or part time observers at Commission meetings—that will profit from the bill, a result surely not intended by the draftsmen of the bill.

Let me briefly focus on those aspects of this legislation which the Commission finds most objectionable.

The verbatim transcript requirement: The Commission believes strongly that the verbatim transcript requirement is a principal harmful feature of this legislation. It is a costly feature; it will provide no benefit to the public if, as the bill seems to imply, the transcript is not intended to become publicly available; the bill may not adequately be drafted to prevent the disclosure of such transcripts; it could inhibit free discussion of sensitive matters; and it could impair the Commission's decisionmaking processes, and the flexibility of its informal administrative procedures; all in those instances where candor and confidentiality are most essential and seemingly endorsed by the bill.

In this context, we think one of the bill's major difficulties is its failure to analyze the reasons for which agency meetings may legitimately be closed to the public. When Chairman Hills testified on the predecessors of H.R. 11656, before a Subcommittee of the Committee on Government Operations, he endorsed the recommendation made in this regard by the Association of the Bar of New York.* I would again like to call this particular suggestion to your attention, and urge careful consideration of it.

The Bar Association pointed out, correctly we believe, that the reasons for permitting the closing of meetings may analytically be divided into two categories: functional closings—that is, closings necessitated by the function being performed at the meeting in question by the agency; and disclosure closings—closings necessitated by the type of information which might be made public by opening the meeting, regardless of the function being performed by the agency. Functional closings contemplate discussions of matters which should be kept confidential in their entirety, thus resulting in the closing of the entire discussion; disclosure closings contemplate discussions which by their nature could be conducted in public, except for the fact that sensitive matters will be considered. These distinctions may be inherent in the present provisions of this legislation, but the bill should be amended to sharpen and clarify the distinction.

While the requirement of a transcript may make some sense for meetings only partially closed for disclosure reasons, the requirement seems to us wholly inappropriate for functionally closed meetings, such as those at which active investigations are discussed. For those meetings, there are far greater costs and risks, with only minimal benefits. Presumably, the meetings, or portions thereof, which may be closed under the bill, are closed because the bill's sponsors did not want to inhibit or impede full, candid, confidential and expeditious resolution of sensitive matters. The maintenance of a verbatim transcript of those closed meetings, however, is the very antithesis of the principle justifying according these matters confidentiality.

Moreover, in those categories of cases where the bill finds that the presumption of openness does not apply, the argument made by the sponsors of the bill—that

*See Hearings before the Subcommittee on Government Information and Individual Rights of the House of Representatives Committee on Government Operations on H.R. 10315 and 9868, p. 227.

a transcript is needed in order to control the agencies and police their implementation of the Sunshine Act—is far weaker. Less stringent controls will suffice to discover meetings improperly closed—for example, the official minutes routinely kept by the Commission (normally nonpublic but subject, of course, to in camera inspection under this legislation) will identify the nature of each matter considered in a closed session and the action taken on that matter. Additional safeguards can be added, without the stringent requirements embodied in this legislation.

In addition to not providing any substantial benefits, the recording of discussions of sensitive investigations and other matters invites very real abuses. The bill seems to recognize this in part; it exempts from the transcript requirements matters involving pending civil actions or agency adjudications. But it is difficult, if not impossible, to distinguish that kind of information from at least some of the other nine classes of information accorded confidentiality by the bill. We submit, therefore, that the exemption from the transcript requirement should extend beyond the limited basis now set forth, to encompass at least the most sensitive, and more functionally-related, other categories of information set forth in the bill, including discussions of investigative records and market-sensitive information.

We also believe that such meetings should be exempt from the advance notice requirement and from the requirement that a list of persons attending such meetings and their affiliations be published. Knowing when the Commission is meeting in closed session, who was present at a meeting or series of agency meetings, and what their affiliations are, would often convey substantial information to the special interests who are able to follow Commission matters in minute detail—information which in many cases could be used to frustrate public ends.

The encouragement of undue litigation. We do not believe that much elaboration is needed on the provisions of this bill which encourage undue litigation, and which led seven members of the Committee on Government Operations to describe this legislation as “a bonanza for the legal profession.” That this is indeed the case should be evident from even a cursory reading of the bill. Suits can be brought against any agency covered by the Act in the plaintiff’s own home district, regardless of the location of the agency or the place where the meeting is held. Attorney’s fees and costs are guaranteed if the plaintiff “substantially prevails,” while costs cannot be assessed against the plaintiff, even if he loses, unless he is found to have initiated the lawsuit “primarily for frivolous or dilatory purposes.” The burden of proof is always on the Government to prove a negative—that what it did was correct—and that kind of burden is always a difficult one to meet.

We make several recommendations with respect to the provisions of this bill relating to judicial review of agency action closing a meeting. First, we believe that suit should be permitted to be brought only by a person aggrieved by the substantive agency action taken at the closed meeting in question. Second, we believe that suit should be allowed only in the United States District Court in the District in which the agency has its principal office or in which the meeting in question was actually held. Third, we oppose the provision of this bill with respect to the allowance of attorneys’ fees as an unwarranted encouragement of litigation, one which would place substantial additional burdens on an already overloaded federal court system, particularly where, as under this bill, no showing of substantial benefit to the public is required.

Finally, and most importantly, we recommend the elimination of the relationship created by this legislation between agency decisions to close a meeting and agency decisions on the substantive merits of the matters it considered. Presently, the bill provides for two types of judicial review: first, review to challenge the closing of a meeting; and, second, review which permits any court, otherwise appropriately reviewing the substance of an agency’s action, to consider whether the meeting or meetings at which that substantive action was taken properly was closed.

In the latter situation, if the reviewing court finds such violations, the court may “afford any such relief as it deems appropriate.” We hope this provision does not intend to authorize the modification or invalidation of agency action for reasons related to the improper closing of a meeting, but totally unrelated to the substantive merits of the factual and legal issues considered by the agency. This would, we believe, create a cloud of uncertainty over agency rules and orders otherwise valid, if the agency should err in determining that a particular meeting should be closed. And, it would provide special interest litigants with a powerful new basis on which to attack agency action inimical to their narrow concerns.

This implied change in standards of judicial review was not considered in the Senate hearings on the Sunshine bill now, so far as we are aware, by the House Committee on Government Operations. The provisions of the Sunshine Act which we are discussing, however, will inevitably add to the uncertainties which already prevail. We submit

that an overall review of these issues is necessary before any legislation is enacted, and until that review has been made we recommend that the connection between judicial review of agency decisions to close a meeting and judicial review of the substantive merits of agency action which this bill creates should not be enacted into law.

The inadequacy of the exemption for market-sensitive matters. An exemption from the requirements of the bill has been provided in recognition of the harm that would result if open meetings had to be held for discussions of matters likely to affect the markets for securities, currencies or commodities. Under the provisions of this exemption, a meeting may be closed if it would disclose information the premature disclosure of which would be likely to (1) lead to significant financial speculation or (2) significantly endanger the stability of any financial institution.

The Commission is most concerned that the Sunshine bill not produce a *sub silentio* amendment to the federal securities laws, such as the principle of those laws that no individual should have the benefit of premature access to material information about securities or the markets on which they are traded. By permitting the closing of a meeting only if the resulting disclosure of information would cause "significant" financial speculation or instability, the bill would seemingly permit some degree of instability and some degree of speculation attributable to the discussions which take place at the Commission's meetings. We cannot believe that this result was intended; the federal securities laws, of course, do not distinguish between serious market manipulations and less significant market manipulations.

We are likewise concerned about the difficult standard of proof which the Commission might be required to meet if it invoked the exemption and its decision were challenged in court in a suit authorized by the bill. I believe that there could be frequent occasions when the subject matter of one of our meetings could result in significant financial speculation but we might not be able to demonstrate that it certainly and without any doubt "would . . . be likely" to so result. In such cases, the Commission might either be foreclosed from invoking the exemption or be in the position of having to prove the certainty of the harm it had prevented by closing its meeting.

We believe that the proposed bill fails adequately to take account of this concept of "market-sensitive" information, and that, as a result, it could have consequences never intended, and certainly never desired, by its sponsors and supporters. As an alternative, we suggest that the Subcommittee consider the following exemptive provision which would deal with our concern about market-sensitive information:

The requirements and provisions of this section shall not apply to the meetings of any agency which are likely to involve a discussion of information which, if disclosed, might, in the view of the agency involved, have an adverse effect on the financial markets in which securities are traded or on the professional participants in and self-regulators of the securities markets.

We believe that this suggestion offers the best hope of alleviating some of the unintended difficulties we perceive this bill will engender and we urge this Subcommittee to give it serious consideration.

As I indicated at the beginning of my statement, the Securities and Exchange Commission, due to its Congressional mandate, is particularly sensitive to the need to make full and fair disclosure of government operations to the public. However, we believe the bill under consideration will preclude the realization of any meaningful benefits while engendering an unreasonable amount of additional costs and confusion.

On the other hand, amendments along the lines we have suggested will preserve the basic concept of the Sunshine legislation, and secure the benefits to the public of that concept while eliminating unnecessary red tape and unreasonable costs. For these reasons, we urge that the bill not be reported favorably by the Committee in its present form, but that it be modified in the ways which we have suggested. We will be happy to furnish you with our specific suggestions for amendments to this legislation. The adoption of appropriate amendments could make the bill both workable and palatable, and provide meaningful benefits to the public at a reasonable cost, with minimal adverse effects upon the processes of the Commission.

Mr. PITT. A primary responsibility of our Commission is to insure appropriate disclosures of material facts by those persons to whom the investing public can trust their capital. For that reason, we are sympathetic to the stated objectives of the bill.

I know it is very difficult to have agencies come before you and tell you that they agree with the underlying objectives of the bill and then explain why the particular bill before you is not a desirable

piece of legislation, as now drafted. That is my task, but I must say that the Commission has a sincere commitment to public disclosures and I think its record in the substantive areas speaks for itself.

We cannot support the specific bill before you because we believe it would seriously and needlessly disrupt and impede our effective operations and would operate contrary to the interests of public investors.

One of our concerns, as I will get to in just a moment, is that this bill, *sub silentio*, makes an amendment to the substantive Federal Securities laws we administer, we hope unintentionally, and we think that that is something that should be corrected.

While the bill may be intended to allow individual members of the public to learn what their government is doing—a laudable goal—in actual practice, we perceive that it's unlikely that the members of the public will get to obtain the benefits of the bill. They are not likely to observe very many, if any, of the meetings of the government here in Washington. And as things now stand, it's essentially only the special interests—those interests that can afford full and part-time paid observers of Commission meetings—that will profit from this bill.

I do not think that that is a result that was intended by the draftsmen. Let me briefly focus on three major aspects of the legislation which the Commission finds most objectionable. We, of course, stand ready to work with the subcommittee and its staff to give you detailed specific drafting changes that we think could make the bill more palatable.

First, the bill requires a verbatim transcript for all closed meetings. We oppose this requirement because, first, it will be unduly costly. Second, it will provide no meaningful benefit to the public if, as the bill seems to imply, the transcript is not intended to become publicly available, a question we somewhat dispute. Third, the bill may not adequately be drafted to prevent the disclosure of such transcripts.

Fourth, we think it could inhibit free discussion of sensitive matters. And fifth, it could inhibit and impair the Commission's decisionmaking processes and the flexibility of its informal administrative procedures—all, in those instances, where candor and confidentiality are most essential, and seemingly endorsed by the bill, else why would those matters be deemed closed meetings and subject not to the provisions of the act?

In this context, we think that one of the bill's major difficulties is its failure to analyze the reasons for which agency meetings may legitimately be closed to the public. We perceive two basic reasons: one, a functional reason, a functional closing—that is, a closing necessitated by the specific function being performed by the agency; and second, a disclosure closing—that is, a closing necessitated by the specific type of information which might be made public by opening the meeting, regardless of the function being performed by the agency.

Functional closings contemplate discussions of matters which should be kept confidential in their entirety, thus resulting in the closing of the entire discussion. Disclosure closings seem to contemplate, to us, discussions which, by their nature, could be conducted in public, but for the fact that some sensitive matters will be considered.

The transcript requirements are blunderbuss in this bill. They apply both to functional closings and disclosure closings and we think that is in error. The requirement of a transcript seems to us wholly inappropriate for functionally-closed meetings, such as those at which active Commission investigations or market-sensitive matters are discussed. Presumably, the meetings or portions thereof which may be closed under the bill, are closed because the bill sponsors did not want to inhibit or impede full, candid, confidential and expeditious resolution of sensitive matters.

The maintenance of a verbatim transcript of those closed meetings, however, is the very antithesis of the principle justifying according these matters confidentiality. Moreover, in those categories of cases where the bill finds that the presumption of openness should not apply, the argument made by the sponsors of the bill that a transcript is needed in order to control the agencies and police their implementation of the Sunshine Act is a very weak one.

Less stringent controls will suffice to discover meetings improperly closed. For example, the official minutes routinely kept by our Commission and required by this bill, will identify the nature of each matter considered in a closed session and the action actually taken on the matter.

Additional safeguards can be added, such as: an opinion of the chief legal officer of the agency and a statement to that effect in the official minutes. None of these would require the stringent requirements already embodied in the bill. In addition, the recording of discussions of sensitive investigations in other matters invites very real abuses. The bill seems to recognize this, in part. It exempts from the transcript requirements matters involving pending civil actions or agency adjudications. That's exemption (c)(10). But it is difficult, if not impossible, to distinguish that kind of information from at least some of the other nine classes of information accorded confidentiality by the bill.

We believe that the exemption from the transcript requirements should be extended to encompass all functionally-related matters. Other categories of the information set forth in the bill as exemptions fall within that functional-closing category, including discussions of investigative records and market-sensitive information.

We also believe that the meetings should be exempt from the advance notice requirement and from the requirement that a list of persons attending these meetings and their affiliations be published.

Those records should be kept, but not published. Knowing when the Commission is meeting in closed session, who is present at a meeting or series of agency meetings, and what their affiliations are, would often convey substantial information to the special interests who are able to follow the Commission's matters in minute detail, information which in many cases could be used to frustrate public ends, such as insider trading and premature utilization of the information in the securities markets.

Our second major objection is that the bill would unduly encourage frivolous and unnecessary litigation. We've heard some discussion of that this morning—indeed, the provisions of this bill that seven members of the Committee on Government Operations to describe the legislation as “a bonanza for the legal profession.” Suit can be brought

against any agency covered by the act in the plaintiff's own home district, regardless of the location of the agency or the place where the meeting is held, and any person can sue.

We're not dealing with the finite class of persons affected by the substantive merits of the Commission's actions. We're dealing with the population at large. We can have many suits. No provision in the bill exists to reconcile conflicting suits.

Attorneys fees and costs are available if the plaintiff substantially prevails. While costs cannot be assessed against the plaintiff—even if he loses—unless he is found to have initiated the lawsuit primarily for frivolous or dilatory purposes.

And I suggest that if we were able to prove that, the attorney who brought the lawsuit may be in serious trouble himself. That's not a standard that's likely to be susceptible of proof. The burden of proof in these actions is always on the government to prove a negative: that is, that what the government did was correct and not wrong. That kind of burden is always a difficult one to sustain.

We make several recommendations with respect to the provisions of this bill relating to judicial review of agency action closing a meeting. First, we believe that suits should be permitted to be brought only by a person aggrieved by the substantive agency action taken at the closed meeting in question.

Second, we think that the suit should be allowed only in the U.S. District Court in the district in which the agency has its principal office or in which the meeting in question was actually held.

Third, we oppose the provision of this bill with respect to the allowance of attorneys fees as an unwarranted encouragement of litigation, at least in the absence of any requirement that the plaintiff show substantial benefit to the public, as a result of its action.

I should say at this juncture that counsel for the subcommittee raised the question about whether a review proceeding which could couple challenges under this act would be susceptible of attorneys fees for the whole action. And while we were pleased to hear Ms. Abzug's statement that it would not cover the substantive review portion, the fact of the matter is that the bill is drawn ambiguously.

The bill itself does not make that clear and that is a very serious problem and one that would change our prevailing standards of law. Finally, and most importantly, we recommend that the elimination of the relationship created by this legislation between agency decisions to close a meeting and agency decisions on the substantive merits of the matters it considered. Presently the bill provides for two types of judicial review: first, review to challenge the closing of a meeting or some other improper act under the Sunshine Act; and second, review which permits any court, otherwise appropriately reviewing the substance of an action, to consider whether the meeting or meetings at which the substantive action was taken, properly was closed.

In the latter situation, if the reviewing court finds such violations, the court may afford any such relief as it deems appropriate. In practical terms, what does that mean to an agency like the Commission?

It means that this provision may well authorize a court, finding no substantive error in what the Commission did, but finding an

erroneously closed meeting, to void the entire agency action taken, even though that action is in the public interest, and void it at the instance of somebody who may not prove himself to have been aggrieved by the agency action.

We think that this combination of factors is entirely inappropriate and we think that an error of this sort should not result in the undoing of substantive action. We are disturbed to note that the report of the Committee on Government Operations recognizes that this is, in fact, a possibility that the reviewing court might undertake.

This implied change in standards of judicial review was not considered, so far as we can tell, in the Senate hearings on the Sunshine bill, nor, so far as we are aware, by the House Committee on Government Operations.

We submit that an overall review of these issues is necessary before any legislation is enacted, and until that review has been made, we recommend that the connection between judicial review of agency decisions to close a meeting and judicial review of the substantive merits of agency action should not be enacted into law.

Our third objection is that the bill inadequately exempts market-sensitive matters from its terms. And this is where we perceive some amendment of the Federal Securities laws. An exemption from the requirements of the bill—in section (c)(9)(A)—has been provided in recognition of the harm that would result if open meetings had to be held for discussions of matters likely to affect the markets for securities, currencies, or commodities.

As now worded, as I've indicated, the bill may amend the Federal Securities law principle that no individual should have the benefit of premature access to material information about securities or the markets in which they are traded.

By permitting the closing of a meeting, as this amendment in the bill now does, only if the resulting disclosure of information would cause significant financial speculation or instability, the bill would seemingly permit some degree of instability and some degree of speculation attributable to the discussions which take place at the Commission's meeting. We cannot believe that this result was intended. The Federal Securities laws, of course, do not distinguish between serious market manipulations and less significant market manipulations. Neither should this Act.

We are likewise concerned about the difficult standard of proof which the Commission might be required to meet if it invoked this exemption and its decision were challenged in court, bearing in mind, again, that we would have the burden of proof.

I believe that there could be frequent occasions when the subject matter of one of our meetings could result in significant financial speculation, but we might not be able to demonstrate that it certainly—and without any doubt—would be likely to so result.

We have, in our prepared statement, offered some language to deal with this problem. As I indicated at the beginning of my statement, the Commission, due to its congressional mandate, is particularly sensitive to the need to make full and fair disclosure of government operations.

However, we believe that the bill under consideration will preclude the realization of any meaningful benefits, while engendering an un-

reasonable amount of additional costs and confusion. And for that reason, we believe that some substantial modifications should be undertaken prior to its approval by this subcommittee. Thank you.

Mr. FLOWERS. Thank you very much. And your full statement will be a matter of record before this subcommittee. You hit the high points. The questions I had have already been answered in your synopsis there and I have no questions.

Mr. Moorhead, do you?

Mr. MOORHEAD. One thing. You mentioned the fact that only special interest groups would get hold of the information at these hearings and meetings. But if there were open meetings, wouldn't the press, the "Wall Street Journal," and other journals that cover the stock market be there? Wouldn't they make the public aware of the content?

Mr. PITT. I believe that to some extent the financial press would cover the Commission's meeting and that eventually some of our determinations would be made public. What we're dealing with essentially is a time lag, however. The "Wall Street Journal" wouldn't print it probably until the next day.

People who could afford to have a full-time observer—and I must say that there are agencies that we regulate that do do that and have people assigned to the Commission on a full-time basis—of course, would know immediately. They would be able to take advantage, given the market-sensitive nature of some of our information, far more spontaneously and rapidly than the investing public would. They would get that information far in advance. It almost creates an unequal position. That cannot be eliminated entirely. But if our proposal on market-sensitive information were adopted, we would eliminate the nub of the advantage that these individuals might have, which would work to the detriment of the investing public.

Mr. MOORHEAD. I kind of gather—and I may be wrong—but one of the big objections is that information that would come out in these hearings might be information that was not confirmed or established. Information that was rumor or that was opinion, which could affect the market tremendously and still not be substantiated to the point where you would want to release it later on to the public.

Is that one of your big objections?

Mr. PITT. That is precisely one of our objections. The Commission, as you know, is extremely diligent in trying to track down rumors or indications of untoward market behavior. Our staff and the commissioners freely and candidly discuss allegations that on occasion prove totally unfounded.

That information could cause market fluctuations if made public, and if there were people who could take advantage of it and publicize it. I think you have precisely characterized what one of our major concerns is with this bill.

Mr. MOORHEAD. Thank you very much.

Mr. FLOWERS. Mr. Mazzoli?

Mr. MAZZOLI. Mr. Pitt, I have one question. On page 11 of your statement, you give us some wording that you would suggest on market-sensitive matters. And assuming that the committee were to accept this argument, how many meetings of the SEC would fall under this exemption qualification? How many of your agency's meetings do,

in fact, deal with—because I read this thing that it would be in your own judgment. You would make a judgment of whether or not these meetings would involve a discussion which could have an adverse effect on the financial market.

Now, what is the percentage of those meetings?

Mr. PITT. Well, first of all, I would say that there would be a fair number of meetings that I think would come within this. The report itself recognizes that that's an intention of the bill. The report of the Government Operations Committee, at several places, points to the fact that the SEC and the Federal Reserve Board are two of the agencies that really are not intended to be as fully subjected to this Act as others because of the sensitive financial decisions they make.

I would say, however, that the Commission is very concerned about providing an appropriate airing of what it does and in that context Chairman Hills has started a series of meetings with self-regulatory bodies being public, announced in advance, where the participants have general status reports to make and where confidential information, market-sensitive nature, are not involved. So that I think the Commission would undertake, whatever the percentage is, to make every effort to comply with the spirit of this bill, notwithstanding the existence of the exemption and, indeed, I think we already have.

But I do think there would be a sizable number of meetings, although by no means all of our meetings. I don't know even that it would be half of our meetings on that exemption. We do have other meetings where the disclosure closing would apply, that is, investigative work. We do, of course—I would say at least 50 percent of our efforts are investigative and law enforcement in nature and those would already be covered.

But I don't think that it would be the majority of our meetings.

Mr. MAZZOLI. I think the whole effort of the Congress here, if I understood the main sponsors of the bill today, is just simply to be sure that we have some opportunity—we, the people, as well as, we, the Congress—have some opportunity to know exactly what's going on down there because of all of the decisions that are made on these multiple numbers of commissions which do affect how much we make, how much we can take home, and how we live our lives.

And if, of course, we provide reasonable protection so that you're not caused to come forward with information which would ultimately cause us or cause you some difficulty, we would want that to be very carefully circumscribed because otherwise we're giving away the very guts of the bill, which is to give away the opportunity to hear and to view and to perceive what's happening downtown. So that's why I am personally a little bit concerned about language where you conclude that it's in your own view that this information would, perhaps, have a deleterious influence on the market because we're about where we are right now, I guess.

Mr. PITT. No. I don't know that that language is necessarily a sticking point. In any event, I would point out that there would be judicial review. It would not be intended that judicial review would not apply and if I may turn around the suggestion of the Chairman to the sponsors of the bill, it seems to me that a provision like this could be adopted with, say, a 3-year time limitation and see how it was effectively operated.

If the Commission was abusing this authority—of course, the incentive would be not to—the Congress could always amend it. It seems to me that the risks outweigh whatever advantages, in the context of market-sensitive information. And I believe that this subcommittee has an opportunity both to promote the goals of this Act and yet prevent the Commission's operations from being effectively impaired.

Mr. MAZZOLI. Thank you, Mr. Chairman.

Mr. FLOWERS. Thank you, Mr. Mazzoli. Mr. Kindness?

Mr. KINDNESS. Thank you, Mr. Chairman. Mr. Pitt, first to put this in context, what sort of volume of meetings—how many meetings would we be talking about. How often would there be the need for consideration of whether to close a meeting? Have you made any consideration of that number?

Mr. PITT. We have. There is no question that at every meeting—the Commission—let me step back just 1 second without unduly belaboring this. The Commission meets at least 3 times a week, often more.

It considers a wide-range of matters at each meeting. It seems to me that a large percentage of those meetings include matters that would be subject to one exemption or another under this bill. Each one would require a separate vote to be taken. Each vote would require yet a separate vote to find out whether the vote should be open or closed, because some of the discussions on whether to close a meeting would, in themselves, reveal confidential information.

And I think we would belabor the process. During Chairman Hills' testimony before the Committee on Government Operations, we did a 2-week analysis of the kinds of matters that the Commission considers and that might be instrumental in—I would prefer not to go from memory in terms of reciting all of the matters. But I do have it here and I could dig it out for you.

But I think that would give you a very good idea of what the Commission does each week—trading suspensions, formal orders of investigation, market-sensitive rules, the whole gamut of matters and we presented that to the Government Operations Committee so that they could understand how this bill would affect our operations.

Mr. KINDNESS. Is some of the subject matter in those categories already covered by statutory provision that prohibits dissemination to the public?

Mr. PITT. The Commission has the statutory authority when it's consonant with its enforcement goals to release any information, if it will help public investors. When we learn of market improprieties, we have to decide when that should be disclosed to alert investors. That often involves very sensitive questions of timing and so on.

There are statutes that the Commission administers which prohibit any member or employee of the Commission from disseminating any of this information unless the Commission has first decided to make it public, so that the process would be that an informed judgment is made for enforcement purposes.

Mr. KINDNESS. So that there would be some degree of conflict between existing statutory provisions and this bill with respect to some information?

Mr. PITT. There might be because of the ambiguity in which the bill is drafted. But I should point out that the provisions on non-disclosure are not mandatory, in the sense that the Commission can

always make things public. The report on the bill you have before you suggests that that would vitiate the conflict and that the provisions of this bill would supercede those provisions and would require us to make everything public.

Mr. KINDNESS. Despite the No. 3 exception which refers to disclosing information required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information?

Mr. PITT. The report makes clear—and that's at around page 10 of the Government Operations Committee Report—that if there's any discretion whatsoever, that it is not encompassed within this exemption.

Mr. SCHROPP. At page 9 specifically it states that a statute that merely permits withholding, rather than affirmatively requiring it, would not come within the exemption.

Mr. FLOWERS. Thank you, Mr. Kindness. That's a quorum call. We're going to adjourn the meeting today, to meet at 10:30 a.m. tomorrow. But first I want to submit for the record, unless there is any objection, a letter from the General Counsel of the Export-Import Bank of the United States, Mr. Warren W. Glick.

[The letter referred to follows:]

EXPORT-IMPORT BANK OF THE UNITED STATES.
Washington, D.C., Cable Address "Eximbank" March 22, 1976.

HON. PETER W. RODINO,
Chairman, House Committee on the Judiciary,
U.S. House of Representatives, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: I understand that H.R. 11656, as reported out by the Committee on Government Operations will be considered by the Committee on Judiciary this week. At this time I would like to urge that the Committee consider a modification to H.R. 11656 which would remedy a problem for our agency without affecting the substantive purpose of the proposed legislation.

Virtually all discussions at the meetings of Eximbank's Board of Directors and Loan Committee make use of confidential commercial and financial information and therefore could be closed by agency regulation pursuant to Section 3(d)(4) of the bill. Even if the meetings are closed by regulation, however, Eximbank would be required under the present bill to keep a complete transcript or electronic recording of the proceedings. Every such transcript or recording would then have to be reviewed by professional staff members to determine the portions of the discussions to be extracted and made available to the public. This would clearly be an administrative task of significant cost and time with doubtful benefit to any person as virtually none of the proceedings would be subject to disclosure. Furthermore, Eximbank already makes the minutes of its meetings available to any person upon request and would of course continue to do so.

We suggest, therefore, that H.R. 11656 be modified to eliminate the requirement for a transcript or electronic recording by an agency whose meetings, or portions thereof, are closed by virtue of Sec. 3(c)(4), the exemption for trade secrets or confidential commercial or financial information. Specifically, page 9, line 2 of H.R. 11656 could be amended by adding "s" to "paragraph" and inserting "(4) or" preceding "(10)".

Very truly yours,

WARREN W. GLICK,
General Counsel.

Mr. FLOWERS. Thank you, gentlemen, for being with us. We'll take into consideration everything you've had to offer us here this morning.

Mr. PITT. Thank you very much.

Mr. FLOWERS. 10:30 tomorrow morning. Would staff please call the other members?

[Whereupon, at 12:15 p.m., the subcommittee adjourned, to reconvene at 10:30 a.m., Thursday, March 25, 1976]

[The following statement was submitted for inclusion in the record:]

STATEMENT OF HON. FRANK HORTON, A REPRESENTATIVE IN CONGRESS FROM THE
STATE OF NEW YORK

INTRODUCTION

I subscribe wholeheartedly to the objectives of this legislation. The public's faith in the integrity of government rests on public understanding of the reasons for governmental decisions, and on the accountability of government officials for particularly those decisions which set legislative or administrative policies which impact on the nation as a whole. However, as recognized in the "Declaration of Policy" which begins on the first page of H.R. 11656, the public is not necessarily served by complete and unfettered disclosure of all government decision-making processes. The words "fullest practicable information" as used in the bill indicate the need for certain sensible limitations.

My differences with H.R. 11656 are relatively few, but they afford an opportunity for highly significant improvements. My principal concern is that the Congress which has enacted the two basic planks for federal information policies, the Freedom of Information Act and the Privacy Act, should adopt a sunshine bill which is consistent with the principles laid down in the two landmark bills we have already enacted. The bill before you does not fully meet this standard since it erodes the clarity and firmness of the FOI Act exemptions, and threatens to erode the privacy protections we have erected for those involved in adjudications before collegial agencies.

I believe that a number of provisions of H.R. 11656 are inconsistent with the Declaration of Policy contained in the bill itself, and that these provisions would permit or mandate disclosures which would injure the rights of individuals and injure the ability of the Government to carry out its responsibilities.

I addressed my concerns with several specific provisions of H.R. 11656 in the Committee on Government Operations, and I feel it is possible to amend the bill in a way that would let every bit as much sunshine behind the doors of government agency deliberations and provide a brand of sunshine which is less clouded by procedural red tape and confusion than that created by H.R. 11656.

My differences with H.R. 11656 are few but important. They include (1) the verbatim transcripts requirement for closed meetings, (2) the definition of "agency", (3) the definition of "meeting", (4) the identification of persons expected to attend a closed meeting, (5) the prescribed venue for actions brought under this legislation, (6) the personal liability of individual agency officials, and (7) the unfettered disclosure of all ex parte communications. These differences are summarized below.

NEEDED IMPROVEMENTS

(1) The Verbatim Transcript Requirement

The verbatim transcript requirement of H.R. 11656 could effectively destroy the provisions of the bill which permit certain meetings to be closed. While the provisions of the bill enable an agency to delete, by recorded vote at a subsequent meeting, sensitive portions of a transcript, they also require the agency to furnish the public what, in effect, are summaries of the deleted portions. In the case of agencies involved in the regulation of financial institutions, for example, harmful inferences drawn from the deletions could result in market speculation or damage to the stability of our financial markets and institutions.

The possibility of later disclosure of a verbatim transcript will inhibit free discussion about sensitive matters and thus impair the decisionmaking process in instances where candor is essential.

Moreover, the effect of the transcript requirement of the bill when coupled with relevant procedural requirements would lead to a situation bordering on the ridiculous.

The bill provides that votes to close meetings must be cast in person, no proxies being permitted. Thus a meeting must be held to vote on closing a subsequent meeting or meetings, and another meeting must be held to vote on any change in the time, place, or subject matter of a meeting already announced.

When these procedural requirements are coupled with the verbatim transcript or electronic recording requirements, the prospect is one of mind-boggling infinity. Thus, when a meeting is properly closed, the complete transcript or electronic recording of the proceedings must be made available to the public except for such portions determined by a recorded vote to fall within the exemptive provisions. In order to

avoid the disclosure of such portions of the transcript, the meeting called to discuss, consider and vote on the proposed deletions must also be closed pursuant to the procedural requirements cited above. Since this meeting would be closed to consider information coming within the exemptive provisions of the bill, the complete transcript or electronic recording of such meeting must also be made available to the public except for those portions determined by a recorded vote to fall within the exemptive provisions. Again, in order to avoid the disclosure of such portions of the transcript of the second closed meeting, a third meeting called to consider and vote on the proposed deletions stemming from the second meeting must be closed, and the transcript of that meeting must be examined at a fourth closed meeting and so on and on ad infinitum. Obviously, some rule of reason must prevail in the implementation of such a provision, but the letter of the law, if observed, would be paralytic in its effect.

I do not subscribe to the position that the transcript requirement is essential to the enforceability of the act and I feel that a reasonable compromise can be worked out in this area. The discovery procedures available to U.S. District Courts do not depend upon the availability of verbatim transcripts or electronic recordings of agency meetings. While the concepts embodied in H.R. 11656 stem from "Sunshine" or "open meeting" statutes of the States, none of the 49 State statutes, so far as I can determine, has a verbatim transcript requirement for either open or closed meetings.

(2) The Definition of "Agency"

The definition of "agency" contained in H.R. 11656 is unclear and would lead to unnecessary confusion and litigation.

The agencies to be covered can and should be specifically listed. A successful precedent for this approach is the Government Corporation Control Act of 1945, 31 USC 841 et seq. This Act has been amended on several occasions to add or delete particular corporations. This procedure would be appropriate for H.R. 11656. Congress can, of course, always amend the Act to add or delete agencies but would be required to review the applicability of the Act on the infrequent occasions when such an agency is created.

(3) The Definition of "Meeting"

Meetings covered by the bill should be those gatherings for the purpose of conducting official agency business of at least the number of individual agency members required to take final action on behalf of the agency. The meeting definition in H.R. 11656 would apply even to casual or social encounters which were not gatherings for the purpose of acting in behalf of the agency.

(4) Identification of Persons Attending Closed Meetings

The requirement of H.R. 11656 that an agency publicly list all persons expected to attend a closed meeting and their affiliations would permit inferences not in the public interest to be drawn from such information. Particularly in adjudicatory proceedings falling under one of the 10 exemptions from the open meetings requirement, premature disclosure of the names of individuals or organizations, concerning or against whom official action may or may not be taken, could lead to damaging speculation or premature public reaction that could result in damage to individual rights, to financial markets or to other interests that should legitimately be protected by government regulators.

(5) Venue For Actions Brought Under the Legislation

I feel that venue for actions brought under this legislation should be limited to the district in which the agency in question has its headquarters or where the meeting in question occurred. H.R. 11656 permits such actions to be brought also where the plaintiff resides or has his principal place of business. This could lead to duplicative lawsuits spread across the country covering the same agency meeting or meetings.

(6) Personal Liability of Individuals

I question the provisions of H.R. 11656 imposing personal liability on individual agency members for attorney's fees and court costs. The assessment of attorney fees and other litigation costs personally against individual members of an agency can only lead to a further diminution of the rewards of public service. This provision would not only discourage qualified persons from accepting agency appointments, but would inhibit performance of official duties by those in office.

(7) Ex Parte Communications

H.R. 11656 would place in the public record all documentation of prohibited ex parte communications even those dealing with matters which, if the subject of an agency meeting, would permit the closing of such meeting, or, if the subject of a

request for documents under the Freedom of Information Act, would be exempt from disclosure under one of the Act's exemptions. I fully support the prohibition of ex parte contacts, but feel this provision could be abused to force disclosure of otherwise exempt information.

COST

It is not possible to estimate the costs of complying with the provisions of H.R. 11656. Certainly the time of a majority of the entire membership of an agency spent in the repeated voting sessions attendant upon closed meetings; the time spent by lawyers and other staff members examining documents; litigation costs arising from actions created by the bill; the administrative burden of preparing a verbatim transcript of each closed meeting, of deleting exempt portions and of providing a copy of the remainder to the public will be significant.

SUMMARY

In summary, I support the purposes of H.R. 11656, but I feel the bill should be improved to avoid disclosures not in the public interest, invasions of privacy, excessive costs and the disruptions and delays of agency proceedings that are bound to result from the enactment of H.R. 11656 in its present form.

GOVERNMENT IN THE SUNSHINE

THURSDAY, MARCH 25, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to adjournment, at 10:30 a.m., in room 2141, Rayburn House Office Building, Hon. Walter Flowers [chairman of the subcommittee] presiding.

Present: Representatives Flowers, Mazzoli and Moorhead.

Also present: William P. Shattuck, counsel; and Alexander B. Cook, associate counsel.

Mr. FLOWERS. The subcommittee will come to order. Continuing with where the subcommittee left off yesterday, the Chair recognizes Mr. Robert J. Lewis, General Counsel of the Federal Trade Commission. Would you proceed, Mr. Lewis?

TESTIMONY OF ROBERT J. LEWIS, GENERAL COUNSEL, FEDERAL TRADE COMMISSION

Mr. LEWIS. Thank you very much, Mr. Chairman. I want to particularly thank the committee for inviting our testimony and also for the efforts you have made to fit us into what I know is a very tight schedule. I also know that you'll want to hear from Judge Tyler of the Justice Department and other witnesses, so I'll try to be as brief as possible in my opening remarks.

I would like to address, if I could—before I get into part of my prepared statement—some of the observations which were made yesterday by the sponsors of this legislation in trying to state, as succinctly as I can, exactly what our position is on the bill.

As my prepared statement makes clear, I hope, the Federal Trade Commission does not oppose the concept of open meetings. We recognize that when legislation passes one body of the Congress by a vote of 94 to nothing, that it must have some appeal. And we certainly agree with what we see as the aims of the legislation.

In fact, if the recommendations which we have provided this subcommittee are adopted, many of the Commission's meetings and a good deal of its agenda would, in fact, be open to the public. So we are in no way opposing across the board the concept of open meetings.

We do oppose the bill as presently drafted principally not because of the burden—the transcripts and so forth, although it is significant and undoubtedly will result in some delay and expense. Neither do

we oppose it principally because open meetings will discourage candor, although that is true, and in fact, has been recognized by Congress in the Freedom of Information Act and by the Supreme Court less than 1 year ago in the *Sears Case*.

Our principal objections are the ambiguity and the definition of the term "meeting" and the ambiguity in the various exemptions relating to law enforcement investigations. Those two things, coupled with the severe penalties for an agency guessing wrong in closing a meeting—namely, that final agency action could be reversed years later for a reason not at all related to the merits of the case—and secondly, the personal liability of the members, which so far as I know, is unprecedented.

So, in summary, if the legislation is enacted as drafted, the Commission will find itself in a dilemma with respect to its meetings where it discusses law enforcement investigation. Basically it will have three choices. It can read the statute very narrowly and close virtually all portions of meetings discussing law enforcement investigations and run the risk that, years later—maybe 5 or 6 or 7 years later—a final agency action, perhaps involving many parties in a complex antitrust action, will be completely reversed because the Commission guessed wrong in the first instance. The second option we will have will be to read the statute quite broadly and open virtually all of its meetings dealing with law enforcement investigations. But this would have, in our judgment, the adverse effect of possibly prejudicing innocent businessmen under investigation. It would reduce the Commission's law enforcement options and could forfeit a good deal of the Commission's deterrent capabilities.

The third option, of course, is not to hold meetings, but to conduct law enforcement investigations by memoranda, which we believe is not what Congress had in mind when it created the agency in the first place.

Mr. Chairman, I'd just like to go through some portions of my prepared statement very briefly and then respond to any questions you would have.

Mr. FLOWERS. I would appreciate it if you would do that. The gentleman will bear in mind that this is a sequential reference to this Committee. The bill was heard at some length before the other committee. I note that your objections are to the definition of the term "meeting," which appears in subparagraph 522(b)(a)(2) on page 2 of the printed bill and to subparagraph 522(c)(7) on page 4 of the bill.

Why don't you address yourself, if you would, please—since you appear to have no opposition to the rest of it—to those particular areas and it would be of great help to the Committee.

Mr. LEWIS. Thank you, Mr. Chairman. I did not mean to leave the impression that we do not have problems with other portions of the bill. We have submitted, I think, about a 12-page appendix which indicates in some detail other improvements which we would like to see. I just wanted to make it clear, understanding that the legislative process is one of compromise, which of our objections we found to be most important to us.

Mr. FLOWERS. Would it be a fair observation that your principal objections, then, are to the definition of the term "meeting" and

to the law enforcement aspect, reserving, of course, the twelve pages of other comment in important, but lesser categories?

Mr. LEWIS. But let me give you a very specific response to that. I think in the following order our objections would be, first, the exemptions in subsection (c) which deal with law enforcement investigations. Now, that's not only subsection 7, but also subsection 10. And we have provided the subcommittee with some specific language in the appendix which we believe would cure the difficulties we have with that.

Second, and second in importance, we would like to see a deletion or a modification of Subsection (i) which permits courts, on review—and this, in our instance, would be the courts of appeals reviewing a final agency order to completely nullify a Commission final order which may, as I suggest, have gone through 8 years of adjudication based on the fact that a meeting discussing the investigation at some point had been improperly closed.

Third, I guess, I would like to see a change in the definition of the "meeting." The term "deliberations," I think, as defined through the various committee reports—both the Senate and House reports—seem to leave open the question of whether or not circulations, pieces of paper making motions that go throughout the body, would be treated as deliberations. And if that's the case, it seems to me that this bill, in effect, has overturned entirely exemption 5 of the Freedom of Information Act.

Finally—well, two more items, I guess, of importance to us—the personal liability of agency members, in certain instances, seems to us to be unprecedented and probably unnecessary in view of the other sanctions under the act. And finally, with respect to the transcripts, as I understand it, there are some agencies who would prefer to take no transcripts at all of closed meetings and they may have very good reasons for taking that position.

As far as we're concerned—even though it would be an expensive kind of thing—we do not necessarily object to making transcripts of closed meetings, but we do object to that part of the bill that would require the Commission, after every meeting, to review the transcripts, to excise those portions which are releasable, and to explain in writing a release to the public its reasons for not releasing those portions of the transcript, which would be held confidential. I could envision that the Commission could have a full-time job on its hands doing nothing but reading transcripts and making judgments as to which parts could be released.

It seems to us that the approach in the Senate bill, which is to have the transcripts taken and then simply placed on file, and then if someone asks for them, the Commission can respond as it does under the Freedom of Information Act: by reviewing the transcript, by excising those portions which may be releasable, and then permitting the party to appeal in court and letting the judge take a look at the thing in camera, and if we have made a mistake, to make it a part of the public record.

But we feel that that sanction ought to be enough without the additional sanctions of personal member liability and the possibility of reversal by an appellate court. On the latter point, as you know, Mr. Chairman, we have some investigations—and particularly in the

antitrust areas—some cases such as the Exxon proceeding, which involves some eight major oil companies. The complaint was brought now nearly 3 years ago. We are still in the pre-trial stage. The people in the Bureau of Competition tell me they don't know when the trial is going to start. It will be a long trial. There will then be a process, of course, of Commission review and then further review in the courts.

This bill would at least leave open the possibility that, having gone through that entire procedure, an agency determination that there had been an antitrust violation could be reversed entirely, leaving the FTC with the option of starting all over again or dropping the case entirely.

Now, it's easy enough to say that no court would do that. But faced with the option at the very beginning of, "Do you open a meeting or don't you?" the Commission probably would open the meeting. And we believe that this would have the effect of getting potential respondents, such as the eight major oil companies, the major benefits of a bill which is quite properly intended to benefit the public.

Mr. FLOWERS. We thank you. Did you wish to give any more specific treatment to these objections? As I understand it, you are concerned here first with the effect upon investigatory records, and second by the provisions relating to judicial review—

Mr. LEWIS. The breadth and scope of judicial review.

Mr. FLOWERS. Right. And number three, the definition of "meeting." Next you got down to the personal liability and the transcripts. Did you wish to expand on any of those as to—not simply the conclusions—but the reason for your objection to the provisions?

Mr. LEWIS. If I may, Mr. Chairman, I think perhaps the best way I could do that would be by treating very briefly that portion of the prepared statement which deals specifically with two of these, if I may.

Mr. FLOWERS. Fine. You may proceed.

Mr. LEWIS. And for the committee's reference, maybe I could pick up about the middle of page 4 and you do have a copy of the testimony in front of you.

Like other law enforcement agencies, the FTC operates within an adversary system of law. In this environment we must be concerned not only with openness and accountability but also the need to do three things: prevent destruction of evidence; conduct candid discussions of legal strategy, including the strengths and weaknesses of various approaches; and third, to afford all potential respondents, including individuals and small businesses, the right to a fair adjudicative hearing with minimum precomplaint publicity.

Mr. Chairman, we believe that H.R. 11656, as presently drafted, will seriously complicate, if not compromise, our law enforcement mission. In fact, it is likely that the greatest beneficiaries of this legislation, if enacted, will be the most diligent students of the Federal Trade Commission, the corporations and the law firms which represent them.

In this regard, the Commission notes that in the last year under the Freedom of Information Act, as amended, these corporations and law firms accounted for more than two-thirds of all initial requests and nearly two-thirds of all appeals.

In contrast, the media and public interest organizations made only 9 percent of all initial requests and a mere 5 percent of all appeals. These figures are further elaborated on in the appendix of my testimony. It would be obviously naive, in our judgment, to expect the attendance of open Commission meetings discussing investigational matters to be limited to the press and public interest groups.

The Commission is also concerned with protecting the rights of privacy and due process of the individuals and the firms which we investigate. Many of our investigations are closed without issuance of a complaint because the evidence simply does not warrant prosecution.

While the Commission routinely discloses the closing of all investigations, unnecessary precomplaint publicity could prejudice innocent persons and corporations, including small businesses.

Lastly, we would like to emphasize the importance of encouraging respondents to provide confidential data voluntarily so as to avoid time-consuming and resource-wasting subpoena enforcement activity. The specter of public discussion which could touch on confidential material would, of course, be contrary to that goal.

Because of these concerns, the FTC has closely followed the progress of open-meeting legislation through the Congress. We submitted extensive written comments on this legislation to the Senate Committee on Government Operations and to the Subcommittee on Government Information and Individual Rights of the House Committee on Government Operations. Although several of our recommendations were adopted by these committees, many of our central objections have not been met either by the bills as passed by the Senate, and as reported out of the House Government Operations Committee.

Although the FTC has a number of problems with this bill in its current form, the objections, and all objections and recommendations are set forth in detail in appendix B of our testimony, I would like to address what the Commission believes are the two more serious weaknesses of this legislation.

First, the limited protection afforded law enforcement investigations and second, the authority giving reviewing courts to invalidate agency action because of an improperly closed meeting. We believe that enactment of H.R. 11656 in its present form would seriously impair the ability of the FTC to discharge fairly and effectively its duties on behalf of the consuming public.

At the Commission, prior to issuance of a complaint initiating a formal, adjudicative process, the Commissioners frequently engage in extensive discussion among themselves and with the staff on such topics as the initiation and conduct of investigations, negotiation objectives, and proposed consent orders, and whether to proceed by rulemaking or on a case-by-case basis, and whether to subpoena documents or require special reports pursuant to our Act. After a final cease and desist order is issued, the Commission will often review compliance reports from respondents and discuss whether these reports are satisfactory or instead necessitate yet another investigation.

We believe that premature disclosure of the substance of any of these discussions could significantly jeopardize the success of Commission efforts to enforce the antitrust and consumer protection laws in accordance with our mandate. Yet the exemptions of this bill do not adequately protect against such disclosure.

Exemption 7, which tracks, I believe verbatim, exemption 7 of the Freedom of Information Act, would permit a meeting to be closed if it can reasonably be expected to disclose investigatory records compiled for law enforcement purposes but only to the extent that production of such records would interfere with enforcement proceedings or result in one of the other enumerated harms under exemption 7.

First, it is not clear that any of the matters which I mentioned in my discussion earlier would fall within exemption 7(A), which is interference with enforcement proceedings, in view of the fact that many of these discussions take place at a time when actual enforcement proceedings may be speculative.

Furthermore, exemption 7 only applies to information contained in investigatory records; hence, discussions of investigatory matters not previously recorded on paper would presumably have to be made public.

Even assuming that the exemption is applicable, judicial interpretation of identical language under the Freedom of Information Act indicates that the burden of proving interference, which this bill would place squarely on the agency, is likely to be insurmountable at the investigatory stage.

This burden, when viewed in the context of the provisions which would allow a reviewing court to invalidate final agency action due to an improperly closed meeting, and which would permit the imposition of litigation costs and attorneys' fees upon the agency, and in some cases, on individual agency members, provides a very strong incentive for agencies not to claim this exemption, even when it believes such claim would be proper.

Exemption 9(B), relating to disclosure which would be likely to frustrate implementation of proposed agency action, would probably not be applicable to discussions of investigative matters. This exemption does not apply where the agency is required by law to disclose the content of its proposed action at any time prior to taking final action on the proposal. Since proposed action in the case of the Commission and other law enforcement agencies is disclosed whenever a complaint issues, this exemption would probably not protect investigatory discussions.

Likewise, exemption 10, which relates to adjudicative and related matters, would not apply to investigative discussions except to the extent that discussion of the issuance of a subpoena is involved.

Interestingly enough, while exemption 10 would not permit private discussion of FTC investigations, it would specifically permit closing the discussion of a civil case where the FTC is a party. This means the agency discussions on compliance matters would be open. But then, ironically, once those discussions turn to the subject of civil penalties in the Federal court, they could be closed.

H.R. 11656 would permit a court, otherwise authorized by law, to review agency action, to invalidate agency action because of an improperly closed meeting. Unlike the subsection providing for civil remedies in a district court which contains a 60-day statute of limitations, the provision dealing with remedies available to a reviewing court contains no such restriction.

Hence, a reviewing court could invalidate final agency action—for instance, a final cease and desist order—because of an allegedly improperly closed meeting which considered issuance of the complaint many years earlier.

If duplication of the administrative process were then infeasible, or too expensive, invalidation at such a later date might result in abandonment of the enforcement proceeding, thus denying to the public forever the benefits of otherwise desirable agency action. And this could occur for reasons totally unrelated to the merits of the proceeding or to the rights of a fair hearing.

Mr. Chairman, I guess the best way to summarize, I hope, the dilemma which faces us, is by comparing our activity in the antitrust and trade regulation area with that of the Department of Justice's Antitrust Division. As this Committee well knows, we enforce similar statutes and sometimes, in fact, have joint jurisdiction under law.

If this bill were enacted, the result would most probably be that Commission conduct of law enforcement investigations would proceed in a much different manner—in the open, as it were—whereas, I presume, the activity of the Antitrust Division would continue pretty much along the same lines, since it would not be covered by the bill.

It seems to us anomalous that enforcement by the Justice Department of the same antitrust laws would proceed as it always has, quite properly, in closed investigatory hearings, and the like, whereas investigations of the Federal Trade Commission, once they reach the Commission level, once the staff wanted to communicate with the Commission, that this communication would probably be forced out into the open, and in our judgment, the beneficiaries of this would in all likelihood be the companies, and in our judgment, not the general public.

Mr. FLOWERS. Thank you very much.

Mr. LEWIS. I mentioned earlier, before you got here, my personal appreciation for you fitting me into——

Mr. FLOWERS. I hope you made your appointment yesterday.

Mr. LEWIS. I made it. I thank you.

Mr. FLOWERS. Thank you for your testimony. I'll see if members who have listened to your testimony desire to ask questions first.

Mr. Moorhead?

Mr. MOORHEAD. We appreciate you being here, especially coming back 2 days in a row. It can't always be worked out otherwise.

About what percentage of your meetings, at the present time, are open to the public?

Mr. LEWIS. None of the Commission meetings are open to the public at present, except the meetings which are held with members of the public present and the Commission has provided that those meetings will be announced in the Federal Register beforehand and that members of the public will be invited.

So that if a company or a trade association wants to meet with the Commission, we would announce that meeting beforehand. It would be a public meeting unless the Commission voted to close it and if it voted to close it, the Commission would have to give its reasons for doing so. Now, I must say in all candor that these kinds of meetings are not frequent. The Commission meets on a

weekly basis, has a weekly agency which it generally breaks down into a non-adjudicative session, where we discuss law enforcement investigations; where we discuss rulemaking, where we discuss administrative matters and personnel matters, where we discuss any advisory opinions or amendments to our own internal rules. And then it enters a second phase of its meeting, which is the adjudicative phase, where it is acting as, you know, as a reviewing court. And that phase of the court would presumably be little affected by this legislation at all.

Other than that, I understand that all adjudicative sessions, including, of course, hearings before the Commission and the like are obviously open to the public and always have been.

Mr. MOORHEAD. Well, as I understand it, your objections would not go to the areas of your meetings where you are discussing changes of rules as far as your own operations are concerned or where you are considering new regulations to be passed by the Commission; but would primarily center on the possible future prosecutions or individual cases where you were considering prosecutions?

Mr. LEWIS. That's exactly right, Congressman. And quite often, it is not possible to say at the very beginning of an investigation, whether the Commission will want to seek prosecution of a particular company or will want to proceed on a trade regulation rule basis. So we would be based with a dilemma right away. I can give you an illustration in the funeral industry. The Commission recently, as you probably have heard, has promulgated a proposed trade regulation rule which would govern the funeral industry. It also sued SCI, which is a large funeral chain.

The Commission, when it first started looking into the funeral area, obviously did not know at the very beginning whether it would be bringing a lawsuit or a rule or both.

Under this bill, the Commission would probably have no choice but to open all of those meetings to the possible advantage of potential respondents.

Mr. MOORHEAD. Now, you are concerned for two reasons: basically, one, that it might hurt innocent people who you decided not to prosecute, and second, that it might jeopardize your case against those whom you later decided to prosecute. That is, it would give the defense or the corporation lawyers the information that they needed to put down your case in court later on.

Mr. LEWIS. Yes. That's right. On the one hand, the Commission closes a very large percentage of its investigations, just simply because they're not supported by the evidence. If the public were invited to attend Commission consideration of some of these investigations, it could obviously result in unwarranted—in adverse publicity to innocent parties.

The other heart of the dilemma, which you suggest, is that when the Commission does go forward with an investigation and proceeds to a complaint, it quite often will talk to the staff in a very candid fashion about, "Should we take a consent order here? What are the strengths and weaknesses of going forward? How much is it going to cost to litigate? What do you think respondent will really take in a consent order?"

These kinds of discussions would be virtually impossible in an open session and presumably would evaporate, thereby giving the Commission fewer options. Presumably, it would just go forward based on its best guess.

One other problem, it seems to me, is that the Commissioners will traditionally discuss, in the course of a proceeding, whether or not to go forward with several respondents or only one. And quite often in these kinds of discussions, elements of the available resources and so forth, might enter in.

If various potential respondents and their competitors are seated around the room, and the Commission decides it is only to bring one case and leave the others alone, this will obviously present a problem and reduce what may be our most valuable weapon, and that is deterrents. No one knows where we're going to strike next.

Mr. MOORHEAD. Do you think that this legislation, then, might reduce the number of prosecutions that you were able to bring successfully?

Mr. LEWIS. I think that could well be the effect, yes.

Mr. MOORHEAD. We had a witness yesterday that testified that, in connection with keeping these transcripts of closed meetings, he had a fear that it might reduce the openness of the witnesses and their willingness to be totally candid with the Commission.

Now, do you think that that same objection might apply as far as you're concerned?

Mr. LEWIS. We don't have as much a problem with that as the SEC. They may have very good reasons for worrying about leaks and the like. As I think I indicated earlier, our problem with keeping transcripts, as such, is no more than just simply the burden and the cost of keeping the transcripts, which obviously is the price you pay for this kind of legislation. And that's a determination which ought to be made in the best judgment of the Congress.

Our problem with the House bill, as I read it, is that after the transcript is taken of our Tuesday morning meeting—the closed portion, if we close any part of it, and sometimes these meetings go on for hours—the transcript would then be made available to the Commission. Someone would go through and have to review it and make the portions public which are not exempt. And then the Commission will have to vote on those portions of the transcript which are exempt, which means that the Commission is going to have to go through and read all of those transcripts each week. This, it seems to us, is unnecessarily burdensome, because if you had the transcript and put it on file, this means that it is there—it exists. And then in a future court challenge, that the judge will be the judge of whether or not there was any improper activity and that ought to be a sufficient sanction.

Mr. MOORHEAD. Are there any amendments that have been considered previously which would take care of your objection, insofar as the openness of the meetings without jeopardizing the effect of this legislation for other departments and agencies?

Mr. LEWIS. We have submitted as appendix B to our testimony some fairly detailed comments, as well as several—I think, three or four—suggested draft substitutes for some of the language. Now, this same information was provided to the Senate Committee and to the

House Government Operations Committee. I presume that they did take a look at this, although so far as I know, formal amendments were not necessarily introduced or sponsored by anyone.

In that regard, I might refer the Committee—if I may be permitted just one specific example—at the bottom of page 6, our appendix B. We propose an amendment to exemption 10, which is as follows—specifically this would exempt meetings which “specifically concern the agency’s participation in a civil action in a Federal or State court, or the initiation, conduct or disposition of a particular investigation or a particular case of formal agency adjudication” and then follow on with the rest of the exemption as presently drafted. That would cure the one objection we had as to the ambiguity of the law enforcement investigations. And as I indicated, we also have problems with the definition of “meeting” and with the sanctions.

Mr. MOORHEAD. Thank you.

Mr. LEWIS. And then we have offered, I think, some specific substantive language which we believe would deal with that. It may create problems for other agencies, but obviously we would be delighted to work with this Committee to try to work out an acceptable substitute language.

I guess at bottom—and I’ll throw this out for whatever it is worth—and certainly this would have been our preference in the beginning and would remain so, although I don’t know how feasible it is at this stage. When we have meetings with people on the outside, we announce these meetings beforehand. And then the Commission puts out an agenda indicating with some particularity what’s going to be discussed and then holds the meeting, or if it closes a meeting, it votes and it explains why it closed that portion of the meeting.

Clearly, this kind of an approach with respect to Commission meetings not involving people on the outside would be preferable to us and, if the requirement to keep a transcript were retained and judicial review were available, as provided and enacted in the district courts, you’d have a situation very similar to operations as is now in the Freedom of Information Act. And it seems to us it would afford adequate protection to somebody who thought a meeting was improperly closed.

As I say, I guess that would be our bottomline preference.

Mr. MOORHEAD. Thank you.

Mr. FLOWERS. Mr. Mazzoli?

Mr. MAZZOLI. Thank you, Mr. Chairman. I don’t really have any questions. I’d like to thank the gentleman for coming back the second day and also for pointing out, I guess, one of the problems that we’re wrestling with here. All of us believe in openness and responsiveness on the part of governmental agencies and ourselves included here. And I think that we, just by nature, feel that any changes would be extremely awkward to live with, if not impossible.

And we frequently find that those anticipations are not borne out in fact. But I think that the detail with which you’ve gone into it with regard to the FTC is useful to us because I think—speaking for myself and I’m sure for the Committee—we’re trying not to hamper the government in doing its job and at the same time provide for the people who have an interest in this thing—the taxpayers—an ability to know if they wish to know just exactly what is going on

and how their money is being paid and the people whom they do pay who are operating these levers of power.

So I think we all agree on the general objective, I guess. The difficulty is trying to orchestrate the thing so that we don't lose sight of the goal really and get ourselves bogged down unnecessarily. But I want to thank you for your time and your testimony.

Mr. LEWIS. Thank you, Mr. Mazzoli.

Mr. FLOWERS. Thank you very much, Mr. Lewis. We appreciate your being here and you can be certain that we'll take your words into consideration on this matter.

Mr. LEWIS. Well, we very much appreciate the opportunity, Mr. Chairman, and I personally want to thank you for the efforts that you've shown in trying to accommodate my schedule also.

Mr. FLOWERS. You're certainly welcome.

Mr. LEWIS. Thank you.

Mr. FLOWERS. Mr. Lewis prepared statement and appendix will be placed into the record at this point, without objection.

[The document referred to follows.]

STATEMENT OF FEDERAL TRADE COMMISSION, PRESENTED BY ROBERT J. LEWIS,
GENERAL COUNSEL

Mr. Chairman, the Federal Trade Commission appreciates this opportunity to present its views on H.R. 11656, the Government in the Sunshine Act.

The Commission is in complete accord with the underlying purposes of this bill—to provide for an open, fair and effective government. No one can deny the merits of open information policies. Our democratic system of government assumes that the people have a right to know what their government is doing for them, to them, and in their name. By increasing public participation and awareness, openness in government can lead to improved decisionmaking, greater accountability, and a restoration of public confidence.

Yet the right of the public to know, important as it is, is not absolute. The public interest is not always best served through openness. No one has advocated, so far as I know, that the Joint Chiefs of Staff should meet in public. Similarly—but for different reasons—the secrecy of grand jury proceedings has long been unchallenged. Even legislative proceedings have been closed upon occasion. In fact, nearly 2 centuries ago, the delegates to the Constitutional Convention met behind closed doors with each delegate sworn to secrecy. In summary, the virtues of openness must often be balanced by ensuring the confidentiality necessary for the effective discharge of agency responsibilities and to protect legitimate rights of privacy.

Striking the balance that best serves the public interest may be a difficult task, but we believe it is not an impossible one.

The Commission understands the desirability of open proceedings and has incorporated that understanding into its rules. Adjudicative proceedings at the FTC are, of course, open to the public. In addition, all meetings between the Commission and outside groups are open to the public unless the Commission votes to close the meeting because of a statute, regulation, or the public interest requires its closing. Thirty days notice of such meetings is given by publication in the Federal Register. This notice includes a brief description of the expected topic, identification of participants, and, if the meeting is to be closed, the reason for closing.

In addition, the Commission has taken the following steps to assure maximum public awareness and understanding of, and participation in, agency proceedings:

The Commission regularly announces the initiation of industrywide investigations and investigations of practices involving risks to the public health or safety when those investigations are initiated. Other investigations are disclosed when a complaint is brought or an investigation is terminated.

The Commission has promulgated tough rules on ex parte communications and requires each staff member to keep logs of all outside contacts pertaining to pending investigations or cases. Each Commissioner also maintains such a log.

The Commission has broadened its policy of disclosing individual Commissioner votes on a wide range of matters, including the issuance of complaints, the ac-

ceptance of consent agreements, the closing of investigations, as well as the issuance of final orders.

Recently the Commission voted to include in our public records all motions to quash compulsory process and Commission responses thereto and applications by former employees and Commissioners for clearance to appear before the Commission and Commission responses thereto.

The Commission has gone beyond the requirements of the Freedom of Information Act by releasing most internal staff memoranda upon request after 3 years and virtually all after 10 years.

In addition to publicizing Commission advisory opinions, the Commission now is making available to the public all staff advisory opinions as well.

Finally, the regulations adopted by the Commission implementing the rulemaking provisions of the Magnuson-Moss Act seek to encourage as much public participation as possible without unduly delaying the rulemaking proceedings.

Despite all of these efforts, however, we must remember that, unlike many independent agencies, the Federal Trade Commission is fundamentally a law enforcement agency. Congress has charged the Commission with enforcement of the Federal Trade Commission Act and various other statutes whose goal is to promote competition in the marketplace and protect the American consumer from unfair and deceptive trade practices.

Like other law enforcement agencies, we operate within an adversary system of law. In this environment we must be concerned not only with openness and accountability but also with the need to:

- prevent destruction of evidence;
- conduct candid discussions of legal strategy, including the strengths and weaknesses of various approaches; and
- afford all potential respondents, including individuals and small businesses, the right to a fair adjudicative hearing with minimum precomplaint publicity.

Mr. Chairman, we believe that H.R. 11656, as presently drafted, will seriously complicate if not compromise our law enforcement mission. It is likely that the greatest beneficiaries of this legislation, if enacted, will be the most diligent students of the Federal Trade Commission, the corporations and the law firms which represent them. In this regard, the Commission notes that in the last year under the Freedom of Information Act, as amended, these corporations and law firms accounted for 67 percent of all initial requests and 63 percent of all appeals. By contrast, the media and public interest organizations made only 9 percent of all initial requests and a mere 5 percent of all appeals. These figures are shown in Appendix A. I would be naive to expect the attendance at open Commission meetings discussing investigational matters to be limited to the press and public interest groups.

The Commission is also concerned with protecting the rights of privacy and due process of the individuals and firms we investigate. Many of our investigations are closed without issuance of a complaint because the evidence simply does not warrant prosecution. While the Commission routinely discloses the closing of all investigations, unnecessary precomplaint publicity could prejudice innocent persons and small businesses.

Lastly, it is important to encourage respondents to provide confidential data voluntarily so as to avoid time-consuming and resource-wasting subpoena enforcement activity. The specter of public discussion which could touch on confidential material would, of course, be contrary to that goal.

Because of these concerns, the Federal Trade Commission has closely followed the progress of open-meeting legislation through the Congress. The Commission submitted extensive written comments on this legislation to the Senate Committee on Government Operations and to the Subcommittee on Government Information and Individual Rights of the House Committee on Government Operations. Although several of our recommendations were adopted by those committees, many of our central objections have not been met either by S. 5, as passed by the Senate, or by H.R. 11656, as reported by the House Government Operations Committee. Accordingly, we appreciate the invitation of this Subcommittee to have us present our views on this important legislation.

Very briefly, H.R. 11656 would require collegial agencies to open all meetings to the public, except those meetings which are likely to disclose information in any one of ten exempt categories. The bill sets forth complex procedures relating to the manner of closing a meeting, announcements of meetings, and the taking and releasing of transcripts. Any person may seek to enforce the provisions of this legislation by suit in any federal district court. Other federal courts, which are authorized to review agency action, may inquire into violations of H.R. 11656 and may also invalidate agency action where that is the appropriate remedy for the improper closing of a

meeting. Litigation costs and attorneys' fees may be assessed against any party, including individual members of an agency. Finally, H.R. 11656 would amend the Administrative Procedure Act to prohibit *ex parte* communications between persons outside the agency and agency decisionmakers relevant to the merits of a proceeding under 5 U.S.C. Sec. 557. Since our Rules of Practice already prohibit such communications, we support this latter provision.

The Federal Trade Commission has a number of problems with this bill in its current form. These objections and recommendations are set forth in detail in Appendix B of our testimony. Today, however, I would like to address what the Commission believes are the two most serious weaknesses of this legislation—the limited protection afforded law enforcement investigations and the authority given reviewing courts to invalidate agency action because of an improperly closed meeting. After careful review, the Commission has concluded that H.R. 11656 does not strike the proper balance between openness, on the one hand, and the effectiveness of collegial law enforcement agencies, including the protection of legitimate rights of privacy, on the other. Enactment of H.R. 11656 in its present form would seriously impair the ability of the Federal Trade Commission to discharge fairly and effectively its duties on behalf of the consuming public.

Prior to issuance of a complaint initiating the formal adjudicatory process, the Commissioners frequently engage in extensive discussion among themselves and with the staff on such topics as the initiation and conduct of investigations, negotiation objectives and proposed consent orders, whether to proceed by rulemaking or case-by-case adjudication, and whether to subpoena documents or to require special reports from corporations pursuant to Section 6(b) of the Federal Trade Commission Act. After a final cease and desist order is issued, the Commission will often review compliance reports from respondents and discuss whether these reports are satisfactory or instead necessitate a new investigation.

Premature disclosure of the substance of any of these discussions could significantly jeopardize the success of Commission efforts to enforce the antitrust and consumer laws in accordance with the mandate of Congress. Yet the exemptions of H.R. 11656 do not adequately protect against such disclosure. Exemption 7, which tracks Exemption 7 of the Freedom of Information Act, would permit a meeting to be closed if it can reasonably be expected to disclose investigatory records compiled for law enforcement purposes but only to the extent that production of such records would interfere with enforcement proceedings or result in one of the other enumerated harms.

First, it is not clear that any of the matters which I mentioned would fall within Exemption 7(A) in view of the fact that these discussions will take place at a time when enforcement proceedings are at most speculative. Furthermore, Exemption 7 only applies to information contained in investigatory records; hence, discussions of investigatory matters not previously recorded on paper would presumably have to be made public.

Even assuming that the Exemption is applicable, judicial interpretation of identical language under the Freedom of Information Act indicates that the burden of proving interference, which H.R. 11656 would place squarely on the agency, is likely to be insurmountable at the investigatory stage. This burden, when viewed in the context of the provisions which would allow a reviewing court to invalidate final agency action due to an improperly closed meeting, and which would permit the imposition of litigation costs and attorneys' fees upon the agency and, in some cases, on individual agency members, provides a strong incentive for agencies not to claim this Exemption, even when believed proper.

Exemption 9(B), relating to disclosure which would be likely to frustrate implementation of proposed agency action, would probably not be applicable to discussions of investigative matters. This Exemption does not apply where the agency is required by law to disclose the content of its proposed action at any time prior to taking final action on the proposal. Since proposed action in the case of the Commission and other law enforcement agencies is disclosed whenever a complaint issues, this exemption might not protect investigatory discussions.

Likewise, Exemption 10 would not apply to investigative discussions except to the extent that discussion of the issuance of a subpoena is involved.

H.R. 11656 would permit a court, otherwise authorized by law to review agency action, to invalidate agency action because of an improperly closed meeting. Unlike the subsection providing civil remedies in a district court which contains a 60 day statute of limitations, the provision dealing with remedies available to a reviewing court contains no such restriction. Hence, a reviewing court could invalidate final agency action, e.g., a final cease and desist order, because of an allegedly improperly closed meeting which considered issuance of the complaint many years earlier. If

duplication of the administrative process were then infeasible, invalidation at such a late date might result in abandonment of the enforcement proceeding, thus denying to the public forever the benefits of otherwise desirable agency action. And this could occur for reasons totally unrelated to the merits of the proceeding or to the rights of a fair hearing.

In conclusion, the Federal Trade Commission again emphasizes its belief that workable procedures can be adopted which recognize the principles of openness but do not jeopardize actions of law enforcement agencies which are essential to the public welfare. We look forward to cooperating with the subcommittee in meeting the challenge of providing open, yet fair and effective, government.

APPENDIX A

INITIAL REQUESTS AND APPEALS SUBMITTED TO THE FEDERAL TRADE COMMISSION, FEB. 19, 1975-FEB. 29, 1976

| | Initial requests | | Appeals | |
|--------------------------------------|------------------|------------------|---------|---------|
| | Number | Percent | Number | Percent |
| Law firms | 358 | 49.6 | 94 | 51.4 |
| Corporations | 128 | 17.7 | 22 | 12.0 |
| Media | 38 | 5.3 | 2 | 1.1 |
| Public interest organizations | 30 | 4.2 | 7 | 3.8 |
| Individuals | 90 | 12.5 | 8 | 4.4 |
| State and local government | 67 | 9.3 | 42 | 22.9 |
| Individual members of Congress | 11 | 1.5 | 8 | 4.4 |
| | 722 | ¹ 100 | 183 | 100 |

¹ Due to rounding, actual total equals 100.1 percent.

NOTE: This table does not include requests for information from Congressional committees and subcommittees or from Federal agencies.

APPENDIX B

FEDERAL TRADE COMMISSION COMMENTS ON H.R. 11656

DEFINITION OF MEETING

Both H.R. 11656, and S. 5 in the form passed by the Senate, define a meeting as the deliberations of at least the number of individual agency members required to take action on the agency's behalf where such deliberations concern the joint conduct or disposition of agency business. This definition is a modification of earlier versions of S. 5, which defined a meeting as a gathering of enough agency members to take action on behalf of the agency where the gathering results in the consideration or disposition of official agency business.

The current definition of meeting represents an improvement, for it excludes situations which are obviously not meant to be included by the legislation, such as where an agency member gives a speech concerning agency business with other agency members in the audience. Also, as stated in the Report of the Senate Committee on Government Operations on S. 5, S. Rep. No. 94-354, 94th Cong., 1st Sess. 18 (1975) ("Senate Report"), the definition connotes that only discussions of some substance are covered. Brief references to agency business by agency members where serious attention is not given to agency matters, and chance encounters where passing reference is made to agency business, are not "meetings".

A possible ambiguity with the current definition of meeting in the sunshine legislation is that because of the use of the term "deliberations" it could be interpreted to include consideration of routine matters by circulation where a formal meeting is not appropriate. This interpretation is suggested by the Report of the House Committee on Government Operations, No. 94-880, Part 1, 94th Cong., 2d Sess. 8 (1976) ("House Report"), which states:

The word 'deliberations' includes not only a gathering of the requisite number of members in a single physical place, but also, for example, a conference telephone call or a series of two-party calls involving the requisite number of members and conducting agency business. The conduct of agency business is intended to

include not just the formal decisionmaking or voting, but all discussion relating to the business of the agency.

Like other agencies, the Commission disposes of many non-controversial matters by means of a circulation from a Commissioner containing a recommendation. Unless another Commissioner requests it, there is no actual meeting on the matter. Due to the press of business and its workload, the Commission considers this procedure essential in carrying out the agency's operations.

The Senate Report on S. 5 states that for purposes of the bill, a meeting is intended to mean a "gathering" with "some degree of formality." Senate Report at page 18. Neither the wording of S. 5 nor of H.R. 11656 nor of the House Report on H.R. 11656, however, makes it clear that a meeting means a gathering or assembly of agency members.

Another problem with the definition of meeting, in both H.R. 11656 and S. 5, is raised by the provision shared by both bills that every nonexempt meeting of an agency, including any subdivision thereof authorized to take action on behalf of the agency, shall be open. This provision is subject to the interpretation that where an agency member has been delegated the authority to take certain actions on behalf of the agency, that member is subject to the open meeting requirement as to those matters, and cannot even meet with staff in private to discuss them. The Senate Report on S. 5 attempts to clarify this matter by stating that the word "joint" in the definition of meeting is intended to ensure that "(i)n all cases, the meeting must involve at least two agency members for the deliberations to be joint" and for the open meeting requirement to apply. Senate Report at page 18. The Senate Report also states, at page 19, that where an agency reserves certain functions for the chairman alone, meetings involving the chairman and staff members or other agency heads need not be open.

The House Report, however, states that the use of the word "joint" in the definition of meeting "does not exclude the situation where a subdivision authorized to act on behalf of the agency meets with other individuals concerning the conduct or disposition of agency business." House Report at 8. The matter is further confused because the actual wording of the two bills reflects neither interpretation.

Therefore, the Commission recommends that the definition of meeting be revised along the following lines:

For purposes of this section, a meeting means an assembly consisting of the deliberations of two or more individual agency members, comprising at least the number of agency members required to take action on behalf of the agency, where such deliberations concern the joint conduct or disposition of official agency business . . .

PRELIMINARY MEETINGS

The Commission objected in its comments on S. 5, Committee Print No. 3, and on H.R. 9868 and H.R. 10315, the predecessors of H.R. 11656, to a provision which required that agencies make a public announcement of a preliminary meeting and whether it would be open or closed. The Commission found this provision unworkable, establishing an infinite regression of preliminary meetings to determine whether subsequent preliminary meetings would be open or closed. S. 5, as passed by the Senate, and H.R. 11656 have dropped this provision. However, the Senate Report on S. 5, as reported out by the Senate Government Operations Committee in the same form as H.R. 11656 currently exists, states that although agency members normally need not meet to decide whether to close a subsequent meeting or decide upon the agenda, "(w)here the agency has such a preliminary meeting, it too would have to be open unless closed pursuant to [an exemption]. Such a meeting would be subject to the same notice requirements, and exceptions, as any other meeting." Senate Report at page 28. The House Report contains similar language at page 13.

The Commission adheres to its objection to this requirement for preliminary meetings held solely to determine the agenda for a subsequent meeting and whether it will be open or closed. The Senate, aware of the difficulty posed for its own committee meetings of debating in open session whether a subsequent discussion will qualify for an exemption, adopted an amendment to Senate Resolution 9, allowing committees to debate in closed session whether a meeting would be open or closed. 121 Cong. Rec. 19347-19356 (daily ed. Nov. 5, 1975).

In light of the above, the Commission endorses the provision added by H.R. 10315 to its definition of "meeting" that a meeting "does not include deliberations solely for the purpose of taking an action required or permitted by" the bill.

BUDGETARY PLANNING INFORMATION

Neither S. 5 nor H.R. 11656 contains any clear exemption for internal budgetary planning information relating to such matters as the prospective allocation of agency resources for law enforcement programs. Public disclosure of a law enforcement agency's budgetary planning activities could indicate relative priorities, thereby diminishing the deterrent effect of potential enforcement activity. Uncertainty as to which areas and practices are targeted for investigation and vigorous regulation has deterrent value.

Furthermore, the need for confidential budgetary planning has been recognized before by Congress. 31 U.S.C. sec. 15 prohibits a federal officer or employee from submitting to Congress or any congressional committee an estimate or request for an appropriation or a recommendation as to revenue needs, "unless at the request of either House of Congress." Although Exemption 3 in conjunction with 31 U.S.C. sec. 15 might afford protection for information that qualifies as an "estimate or request for an appropriation," it would clearly not apply to the major portion of budgetary planning information.

Therefore, the Commission recommends that Exemption 2 of H.R. 11656 be revised along the following lines:

(2) will relate solely to the agency's own internal personnel rules and practices or internal budgetary planning.

INVESTIGATIONS

The Commission finds H.R. 11656 seriously inadequate in meeting the legitimate needs of law enforcement agencies to protect various matters specifically relating to the initiation, conduct, or disposition of an investigation preparatory to adjudication. As discussed by the Commission in its comments on S. 5, and on H.R. 9868 and 10315, in order to maintain the effectiveness and fairness of its law enforcement activities, it is essential to protect from public disclosure evidence which might be used in a law enforcement proceeding, including analysis of its strengths and weaknesses; legal strategy and tactics; investigative and negotiating objectives and priorities; and information whose mandated disclosure would discourage respondents from providing confidential data voluntarily.

Before the initiation of an adjudicative proceeding, which commences with issuance of a formal complaint, the Commission considers at its weekly meetings such matters as whether or not to initiate an investigation, whether to proceed by case-by-case adjudication or rulemaking, authorization for the use of compulsory process, and issuance of orders requiring the filing of reports by corporations. Also considered by the Commission at various stages of its proceedings are consent orders, as well as reports of compliance with a Commission order, which can trigger an investigation.

The public interest is best served by allowing the investigations of federal agencies to proceed without premature public disclosure of information which could jeopardize these investigations, hindering the ability of these agencies to fulfill their statutory duties.

The exemptions in H.R. 11656, like those in S. 5, fall short of sufficiently protecting matters involving the initiation, conduct, or disposition of a particular investigation.

Exemption 7, covering a meeting which can reasonably be expected to disclose information contained in investigatory records compiled for law enforcement purposes, to the extent that disclosure would interfere with enforcement proceedings or cause one of the other harms enumerated would sometimes be applicable. This exemption is based upon Exemption 7 of the FOIA, as amended. But Exemption 7 is inadequate for discussions relating to investigations at meetings of collegial law enforcement agencies for the following reasons:

First, it is extremely difficult to determine in advance and make a subsequent showing in court, if necessary, of precisely what information will interfere with an enforcement proceeding pursuant to Exemption 7(A), especially when the burden of proof is on the agency, as it explicitly is under H.R. 11656 and S. 5. The Senate Report on S. 5 at page 23 does state: "As in the case of the rest of subsection (b), an agency will not be held to a showing of absolute certainty before invoking this provision. The meeting may be closed if the agency properly determines, on the basis of its general experience and knowledge of the particular facts, that the meeting can reasonably be expected to fall within the terms of the paragraph." However, the bills' provisions which allow a court reviewing agency action to invalidate action taken at an improperly closed meeting, which place the burden of proof on the agency, and which impose litigation costs on the agency and, in some circumstances, on its individual members, provide strong factors which may induce agencies not to claim this exemption, even when proper.

In addition, it is quite possible that neither Exemption 7, nor any other exemption, will be applicable in a number of situations involving investigations where the public interest would not be served by public disclosure. Investigative matters which may not be covered by the current exemptions include Commission consideration of whether or not to open a formal investigation, consideration of a consent order prior to issuance of a complaint, consideration of whether to proceed by rulemaking or case-by-case adjudication, and consideration of compliance reports and commencement of compliance investigations.

Furthermore, Exemption 7 only protects information contained in investigatory records compiled for law enforcement purposes. Discussions of agency members at meetings involving investigations may involve investigatory information not recorded on paper. Such information would not appear to be protected by Exemption 7. This exemption should protect investigatory information compiled for law enforcement purposes, to the extent that disclosure would result in one of the specified harms.

Exemption 10 does not appear to be applicable to meetings involving investigative matters except to the extent that issuance of a subpoena is involved, because it applies only to meetings involving the agency's participation in a civil action or the initiation, conduct, or disposition of a particular case of adjudication. Under the Commission's Rules of Practice, as with many other agencies, an adjudicative proceeding is not commenced until issuance of a formal complaint, which generally is preceded by a lengthy investigation.

Likewise, Exemption 9 (b) would usually not be applicable to investigative matters, for it does not apply where the agency discloses the content of its proposed action at any time prior to taking final agency action on the proposal, and proposed action is disclosed by the Commission whenever a complaint issues.

In the Commission's opinion, revision of the bill's exemptions is required to ensure that the effectiveness of the law enforcement programs of the Commission and other agencies is not impaired by premature disclosure of sensitive law enforcement matters. Therefore, the Commission recommends that Exemption 10 be amended along the following lines:

(10) specifically concern the agency's participation in a civil action in Federal or State court, or the initiation, conduct, or disposition of a particular investigation or of a particular case of formal agency adjudication . . .

COMPATIBILITY WITH FREEDOM OF INFORMATION ACT

The language of H.R. 11656 is not consistent with Exemption 5 of the Freedom of Information Act, 5 U.S.C. sec. 552 (b)(5), as recently construed by the Supreme Court in *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

Exemption 3 of H.R. 11656 provides an exemption for a meeting which will disclose information required to be kept confidential by any other statute establishing particular criteria or referring to particular types of information. This exemption does not clearly cover a meeting which will disclose information exempt from mandatory disclosure under the Freedom of Information Act, for the FOIA allows an agency to exercise its discretion to release such information. Exemption 5 or the FOIA, 5 U.S.C. sec. 552(b)(5), which exempts from mandatory disclosure the expression of opinions, views, and recommendations by staff or members of an agency in predecisional internal memoranda, does not appear to be covered by the bills' exemptions. S. 5 clearly states that it does not confer any additional rights on any person to inspect or copy, under 5 U.S.C. sec. 552, any documents or other written material within the possession of any agency, and H.R. 11656 expressly forswears any intent to limit the present rights of any person under the FOIA. Yet, communications protected from mandatory disclosure in written form under the FOIA are not protected under either bill if in oral form at an agency meeting.

Underlying Exemption 5 of the FOIA was the determination that "it would be impossible to have any frank discussion of legal or policy matters if all such writings were to be subjected to public scrutiny." S. Rep. No. 813, 89th Cong., 1st Sess. (1965). If, as the Supreme Court has recognized, predecisional communications are privileged under Exemption 5 "to prevent injury to the quality of agency decisions," *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. at 151, it is incongruous for these communications to lose their privileged status when expressed orally. If the distinction is retained in this legislation as enacted, the spectre arises of agency meetings in which members and staff engage in discussions by referring to advice in internal memoranda by page and line number.

Attention should be given to the inconsistent approach between H.R. 11656 and the FOIA, especially the fact that the FOIA provides an exemption from public disclosure of written intra-agency and interagency communications expressing opinions and advice.

TRANSCRIPTS OF CLOSED MEETINGS

H.R. 11656 would require that a complete transcript or electronic recording be made of each meeting or portion closed to the public, except for a meeting or portion involving adjudicative matters coming within Exemption 10. On its own initiative, an agency must promptly provide to the public the transcript or recording, excluding exempt matters, and furnish to any requester a copy of the transcript or transcription of the recording at the cost of duplication.

H.R. 11656 provides that an agency may delete from a transcript portions of a meeting determined to contain exempt information only by means of a recorded vote of agency members. Further, "In place of each portion deleted from such a transcript or transcription the agency shall supply a written explanation of the reason for the deletion, and the (exemption) . . . said to permit the deletion." These requirements, which go well beyond the requirements of the Freedom of Information Act, would place an enormously time-consuming burden upon agencies. In the typical case of a meeting for which there was a lengthy transcript containing many exempt and nonexempt portions, it could well take days or weeks to comply with the requirements. Such a scheme was explicitly discarded from the transcript provisions of S. 5:

The subsection does not require the agency to follow any specified procedure in determining whether to make the record of a meeting available to the public. It does not require, for example, that a record of the vote be provided the public, or that even a formal vote on the matter be taken.

SENATE REPORT AT PAGE 31

We recommend that the provisions of H.R. 11656 requiring a vote to delete exempt portions from a transcript, a written explanation of the reason, and an identification of the exemption permitting the deletion, be eliminated.

REMEDIES

Like S. 5, H.R. 11656 grants jurisdiction to district courts to enforce the requirements of the bill pursuant to an action brought by any person. Unlike S. 5, however, H.R. 11656 contains no provision requiring any person bringing such an action to first notify the agency of his intent to sue and allow the agency ten days to correct any violation or two days where he makes known his intent prior to a closed meeting.

A district court is denied jurisdiction to set aside or invalidate agency action taken or discussed at an agency meeting improperly closed to the public, except that a court otherwise authorized by law to review agency action may "afford any such relief as it deems appropriate" for agency violations at the application of any person properly participating in the proceeding pursuant to applicable law.

Consequently, S. 5 and H.R. 11656 appear to allow a court to set aside agency action at the application of a party to a judicial proceeding reviewing agency action under other applicable law. This is made clear with regard to S. 5. The Senate Report at page 34 states:

The reviewing court can afford any relief it deems appropriate. This may include the release of a transcript of an improperly closed meeting. It may also include reversing an agency action on the grounds that it was taken at a meeting improperly closed to the public. See House Report at 19.

The Commission endorses the restriction imposed upon district courts denying jurisdiction to set aside agency action by any person. Without this restriction, final agency action would remain in doubt until judicial proceedings, which could be initiated by any person, had concluded; those subject to agency regulation would find it extremely difficult to order their affairs.

For the same reasons, the Commission continues to believe that it is contrary to the public interest to empower a court otherwise authorized to review agency action to set aside action taken or discussed at an improperly closed meeting at the application of any person properly participating in the proceeding pursuant to other applicable law. By so doing, these bills would unnecessarily cast doubt upon the validity of all final agency actions subject to judicial review, for reasons totally unrelated to the merits of the proceeding or to the right to a fair hearing. Invalidation of agency action by a court would result in either the abandonment of the proceeding or the reprocessing of the matter. If it is not feasible for the agency to duplicate the action, due to the passage of time or otherwise, the public may forever lose the benefit of highly desirable agency action. For the agency to retrace the steps leading to its previous decision, only to reach the same decision, would result in an essentially pro forma requirement.

A further problem of the provision allowing a court to invalidate agency action is that it contains no limitation upon the time after which a closed meeting can

be challenged by a party. In contrast, the general provision granting civil remedies to any person provides that an action challenging the closing of a meeting must be brought within sixty days after the meeting. With no statute of limitations, the provision authorizing invalidation of agency action, would allow a court reviewing agency action, e.g., a final cease and desist order, to inquire into an allegedly improperly closed meeting which considered issuance of the complaint years earlier.

The Report of the House Committee on Government Operations does state that appropriate relief might include nullification of agency action "in a rare instance." However, the actual language of H.R. 11656 does not express that limitation.

Therefore, the Commission recommends that the provision of H.R. 11656 regarding relief which can be ordered by a court otherwise authorized by law to review agency action be stricken in its entirety. The Commission also suggests that there be included in H.R. 11656 a provision similar to that in S. 5 requiring advance notice to an agency to permit correction of any violation without unnecessary litigation.

ASSESSMENT OF LITIGATION COSTS

H.R. 11656 and S. 5 permit a court to assess reasonable attorney fees and other litigation costs against the individual members of an agency, when the plaintiff "substantially prevails in the action," and the court finds that the agency member has "intentionally and repeatedly violated this section." Although it is understandable that these bills would attempt to put some teeth into their sanction provisions in order to deter violations, this provision runs counter to a well-established legal doctrine that an officer of the United States, acting in the course of his official duties, enjoys immunity from suit as a result of his decisions and actions in carrying out his duties. See *Barr v. Mateo*, 360 U.S. 564 (1959). Under this doctrine, a Federal official is not personally liable for actions taken within the outer perimeter of the official's line of duty. 360 U.S. at 575.

We submit that the other remedies and sanctions provided by the legislation are sufficient to deter intentional and repeated violations. If it is determined, however, that individual agency members should be held accountable for intentional and repeated violations of the open meeting requirements, we suggest that the proper procedure be a recommendation to the President that he take appropriate disciplinary action.

EX PARTE COMMUNICATIONS

H.R. 11656, as well as S. 5, prohibits ex parte communications between agency employees involved in the decisional process of a proceeding and persons outside the agency, relevant to the merits of proceedings subject to 5 U.S.C. sec. 557. This prohibition would apply to adjudications and formal rulemaking.

The Commission's Rules of Practice contain a prohibition on ex parte communications. Rule 4, 7, 16 C.F.R. 4.7, prohibits ex parte communications in adjudicative proceedings between any person not employed by the Commission or an employee performing an investigative or prosecuting function in connection with the proceeding and any employee involved in the decisional process, with respect to the merits of that or a factually related proceeding.

Although the Commission and many other Federal agencies currently have existing rules or regulations prohibiting ex parte communications, the Commission supports the attempt of these bills to place a prohibition upon ex parte communications between agency employees involved in the decisional process of a proceeding and persons outside the agency, in all proceedings subject to section 557. This would set minimal standards for all agencies, some of which may not currently have rules prohibiting ex parte communications. It would also fill in the gaps left by section 554(d) of the Administrative Procedure Act, which prohibits ex parte communications between an administrative law judge or hearing examiner and a person or party about a fact in issue, and between an employee or agency involved in investigative or prosecuting functions for an agency in a case and an employee engaged in the decisional process in that or a factually related case.

The Commission offers the following suggestions for the section on ex parte communications in these bills.

(1) H.R. 11656, like S. 5, prohibits an ex parte communication from (sec. (d)(1)(A)) or to (sec. (d)(1)(B)) an "interested person." The Commission recommends that the word "interested" be stricken, for it would be difficult for an agency to determine exactly who is an "interested person", as "person" is defined in the bill and in the APA. Presumably, as a matter of common sense, any person who transmits or receives a prohibited ex parte communication would be an "interested person"; therefore, the qualifying term "interested" is redundant and only offers an escape valve from the

section's prohibitions. In addition, the subsection of these bills allowing an agency to dismiss a claim or interest in a proceeding upon receipt of a prohibited ex parte communication from or caused by a "party" should apply to such a communication from any "person", rather than simply a party; the same sanctions imposed upon a formal party should apply to an intervenor, who may not formally be considered a party under some circumstances.

(2) There are two distinct types of "ex parte" communication problems with respect to persons outside the agency. The first type, which is covered by the language of H.R. 11656, concerns ex parte communications with agency adjudicators "relevant to the merits of the proceeding." The other type of ex parte communication relates to contacts with agency adjudicators which, while not relevant to the "merits of the proceeding," are designed to influence the decisionmaking process and which can adversely affect the integrity of the adjudicative process (e.g., influence peddling). Accordingly, some consideration should be given to prohibiting any person from making or causing to be made to any member of the body comprising the agency, administrative law judge, or employee who is or may be involved in the decisional process of the proceeding, an ex parte communication which under the circumstances may reasonably be construed to be calculated to influence the outcome of a proceeding.

With this revision, the ex parte section of H.R. 11656 would prohibit:

... an ex parte communication relevant to the merits of the proceeding or which, under the circumstances, may reasonably be construed to be calculated to influence the outcome of the proceeding.

(3) The Commission recommends that the following provision be added to the ex parte section of H.R. 11656.

Requests for information and responses thereto with respect to the status of a proceeding subject to subsection (a) of this section, and communications concerning a procedural matter, such as the time, place, and manner of conducting the proceeding, shall not be deemed to be communications prohibited by this subsection.

This provision would permit request for status reports and routine, nonsubstantive communications incident to a proceedings, such as scheduling arrangements for prehearing conferences. Any subtle attempt to influence the outcome of a proceeding however, would be barred by the general prohibition on ex parte communications, under the revision suggested above.

Mr. FLOWERS. Our next witness—and we're delighted to have him with us—is Hon. Harold R. Tyler, Jr., Deputy Attorney General, accompanied by our old friend, Hon. Antonin Scalia, Assistant Attorney General.

General Tyler, I am delighted to have you for the first time before us, I believe. Mr. Scalia has been here on numerous occasions, always does an excellent job. We don't agree with him all of the time, but we do agree that he does a good job.

I just followed his presentation down at the Administrative Law Judges Conference and I heard him say some awful things about some legislation that emanated from this subcommittee. But I want you to know that that will not discolor our attention to your remarks whatsoever.

Mr. SCALIA. I warned the Deputy about that, Mr. Chairman.

Mr. FLOWERS. You didn't hear what I said about you after you left, though, did you?

Mr. SCALIA. Fortunately, you came in late in the speech.

Mr. FLOWERS. Maybe they didn't have it recorded, but I think they did. Please proceed, sir.

TESTIMONY OF HAROLD R. TYLER, JR., DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, ACCOMPANIED BY ANTONIN SCALIA, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. TYLER. Mr. Chairman, we are glad to be here this morning

to present to the committee our views on H.R. 11656. The Department of Justice shares the apparent interest of the bill's drafters in making government processes more open and accessible to the public.

But as you will note from our prepared statement, which I will ask leave to enter in the record—

Mr. FLOWERS. It will be so entered.

[The prepared statement of Mr. Tyler follows:]

STATEMENT OF HAROLD R. TYLER, JR., DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

I appreciate the opportunity to present to the subcommittee on Administrative Law and Governmental Relations the views of the Department of Justice on H.R. 11656, a "Government in the Sunshine" bill.

The Department of Justice shares the apparent interest of the bill's drafters in making government processes open and accessible to the public. But, as you will note, we are convinced that H.R. 11656 is excessively complicated, ambiguous and fraught with perils of excessive litigation and inordinate expense—all unnecessary shadows and clouds upon this desired sunshine.

The difficulties we perceive with H.R. 11656 are perhaps inherent in legislation which seeks to provide uniform and detailed procedural requirements for the diverse departments and agencies that comprise the Executive Branch. Our reservations relate to the breadth of its coverage, ambiguities in its language, and its relationship to other laws. In summary, we are most concerned about the uncertainty as to which agencies and meetings are covered, the exemptions from the open-meeting requirements and procedures for using them, the requirement for maintaining and reviewing verbatim transcripts for all closed meetings, and the breadth and unprecedented severity of the judicial review provisions. Modifications in these areas are necessary to guard against (1) injury to the privacy rights of individuals who work for or appear before collegial agencies and (2) serious impairment of the agencies' ability to carry out their statutory responsibilities. In addition, certain provisions of the bill are inconsistent with the principles laid down by the Freedom of Information Act and the Privacy Act. I would like to review the provisions of H.R. 11656 that cause these difficulties, and then offer alternatives that we believe would be significant improvements.

AGENCIES COVERED

The bill relies upon the definition of "agency" found in the amended Freedom of Information Act (5 U.S.C. 552(e)), which definition in turn is based largely upon the "agency" definition found in the Administrative Procedure Act (5 U.S.C. 551 (c)). Neither definition provides much guidance. The FOIA definition of "agency" was designed to include even the smallest entity having power to act, not just a class of entities with shared collegial characteristics as this bill would. And the APA definition (and by reference the FOIA and sunshine definition) is phrased in very broad, general terms as "each authority of the Government of the United States. . . ." This expansive definition of uncertain scope has not been clarified by the courts that have been asked to determine whether various government entities are "agencies" within the APA. Compare *Soucie v. David*, 448 F. 2d 1067, 1075 (D.C. Cir. 1971) with *Washington Research Project, Inc. v. H.E.W.*, 504 F. 2d 238, 245-248 (D.C. Cir. 1974), and the Supreme Court's recent decision in the FOIA case of *Renegotiation Board v. Grumman Aircraft*, 421 U.S. 168, 187-88 (1975). These decisions suggest that administrative entities may be agencies for some but not all purposes, depending upon the function that the administrative entity is called upon to perform in a particular instance.

Since the APA and FOIA definitions are so unclear, it is likely that the agencies listed on pages 15 and 16 of the Senate report (S. Rept. 94-354, 94th Cong. 1st Sess.), which nearly all Executive Branch agencies are using as the basis for determining their status under the bill, may not be the only ones that are subject to openness requirements. Moreover, since the Senate bill (S. 5) uses the APA definition, which is slightly narrower than the FOIA definition used in H.R. 11656, some entities, such as the Council on Environmental Quality, might be agencies for the purposes of the House bill but not the Senate bill and therefore would not be listed in the Senate report. Without more specificity, therefore, some collegial agencies will not know whether they must comply with an enacted Sunshine statute, and the validity of action taken by such agencies may be in doubt until their status under the bill is litigated.

The probable result of this ambiguity—numerous costly and time-consuming disputes over coverage—could easily be avoided by listing in the bill itself the agencies intended to be covered. Not only would such a list avoid legal disputes and litigation as to the bill's coverage, but it would also prevent unintended coverage, and eliminate the possibility of the agency's actions being enjoined pending resolution of the coverage issue. The existence of such a list would also permit Congress to add agencies to it when new collegial-type bodies are created, thereby ensuring that any newly-created agencies would be subject to sunshine provisions only if this was Congress's express intent.

A successful precedent for this suggested approach is the Government Corporation Act of 1945, 31 U.S.C. 841 et seq. Government corporations, which are as varied as collegial agencies, are not easily defined in one statutory phrase. Congress recognized this difficulty and chose to address it effectively by using a statutory list. The Government Corporation Control Act has been amended on several occasions to add or delete from its scope particular corporations, a practice that would be appropriate for a sunshine statute.

MEETINGS COVERED

The definition of "meeting" also presents problems. This definition is crucial, since when there is no "meeting" the bill does not apply. The present definition states that a "meeting" consists of "deliberations . . . (which) concern the joint conduct or disposition of agency business." The problem with this approach is that it is ex-post-facto. It does not enable a "meeting" to be clearly identified in advance, even though the most important action required by the bill (the giving of public notice) must be taken before the meeting occurs.

Obviously, any provision which imposes a prior notice requirement must look to the purpose of the gathering rather than to what, after the fact, is found to have occurred. We suggest, therefore, that the purpose element be made an essential part of this definition. Our suggestion would leave open, of course, the problem of a gathering which though not called for that purpose, proceeds to dispose of agency business. However, that problem should be handled directly rather than by means of an unrealistic and unworkable definition of meeting. We would suggest adding to subsection (b) of the bill a provision to the effect that "members as described in subsection (a)(2) shall not conduct or dispose of agency business at any meeting except at an agency meeting complying with this section."

I interpret the phrase in the present definition "at least the number of individual agency members required to take action on behalf of the agency" to mean the number so required with respect to the agency business which is the subject of the deliberations. A nine-member agency may, for example, have delegated certain relatively unimportant aspects of its business to a subcommittee of three for final disposition. I presume that a meeting of three members at which there is discussed other agency business, would not come within the definition. It would be useful to make that point more clear in revising the language of the definition.

There are a few other technical ambiguities which might likewise be clarified. For example, the present definition could literally be construed to cover "deliberations" through written memoranda rather than at physical gatherings. Indeed, the word "deliberations" could even be interpreted to cover the thought processes, expressed orally or in writing, of only a single agency member. To remedy all these problems, we suggest that the definition be amended to read as follows: "The term 'meeting' means a gathering, for the purpose of considering the joint conduct or disposition of agency business, of two or more agency members, but at least the number required to take action on behalf of the agency with respect to such business."

Another difficulty with the bill's current definition of meeting is that it is broad enough to include all the meetings an agency might hold for the sole purpose of taking action with respect to the bill's many procedural requirements. For example, it presumably is a "meeting" covered by the bill if agency members meet pursuant to subsection (d) to decide whether to close a meeting; or if agency members meet pursuant to subsection (e) to determine whether to have a scheduled meeting at an earlier date, or to change the time, place, or subject matter of a meeting; or if agency members meet pursuant to subsection (f) to decide which portions of the transcript of a closed meeting are exempt. Since subsections (d) and (e) require that every meeting be preceded by an agency vote on whether to close or open it, as well as by a public announcement, agencies will be forced to spend time applying these procedures to meetings that are merely held to insure compliance with the bill. Worse, an infinite regression might be established: A preliminary meeting under subsection (d) to consider whether a subsequent meeting should be open or closed

would have to be preceded by a pre-preliminary meeting to consider whether the preliminary meeting should be open or closed, *ad infinitum*.

To avoid such absurd results, we suggest that language be added to the meeting definition which simply states:

... but does not include gatherings which are called solely to take or consider action necessary to comply with this section. This provision, in our view, is required to ensure protection of exempt information. Subsection (c) provides that the requirements of subsections (d) and (e) "shall not apply" to exempt information: But an agency may have to call a meeting, which under the present provision would have to be open, to decide whether information is exempt for purposes of subsection (d) and (e), and at such a meeting the information itself would have to be discussed.

EXEMPTION PROVISIONS

Several changes to the exemption provisions of the present bill, we submit, are essential to preserve the exemptions provided under the Freedom of Information Act—provisions which the Congress has already subjected to considerable care and scrutiny. Though the existing bill language apparently seeks to track the FOIA exemptions, in several respects the tracking is neither precise nor adequate.

First of all, the crucial investigation exemption contained in subsection (c)(7) is inadequate as written because it addresses not the disclosure of certain investigative information but only that information when it is in the form of "investigatory records." This phraseology is sufficient in the context of the Freedom of Information Act, where a request can only pertain to recorded information. When transported verbatim into the present legislation, however, it does not protect the full scope of interests which it protects in the freedom of information context. A meeting cannot be closed merely because the information it discloses would interfere with law enforcement proceedings, or disclose confidential sources, or reveal investigative techniques, or even endanger the lives of law enforcement personnel. It is only if and when this information is revealed by means of the disclosure of investigatory records that the exemption would apply. This is obviously an irrational limitation and should be eliminated. The entire exemption should be recast so that any disclosure of information of the type described would justify a closed meeting, whether or not the manner of disclosure is through the revelation of investigatory records. We consider this change to be essential.

The present bill contains no counterpart to exemption (5) of the Freedom of Information Act, which is the exemption for interagency or intraagency memoranda or letters. To some extent, of course, the very philosophy of this legislation is incompatible with such an exemption, since that philosophy discounts the value of confidentiality in deliberations which that exemption is intended to preserve. But the "sunshine" philosophy has only been applied to deliberations at the very highest level of the agency—that is, among the members who comprise the collegial body which is the agency head. Yet the bill as now written would also destroy the confidentiality which exemption 5 of the Freedom of Information Act accords to lower level memoranda, whenever those memoranda happen to be discussed at an agency meeting. I acknowledge that it is difficult to preserve the one value without losing the other. That is to say, an agency should not be able to evade the open meeting requirement by simply basing its discussion of the particular subject upon a staff memorandum which would be exempt from disclosure under the Freedom of Information Act. Nonetheless, at least a few reasonable exceptions can easily be made. For example, it should be possible to close a meeting which is called for the purpose of discussing whether a Freedom of Information Act request for a particular document should be denied on the basis of FOI exemption 5. Such a meeting would have to be open—and in effect reveal the document—under the existing exemptions in the present bill. Similarly, an agency meeting for the purpose of considering the advice of counsel with respect to judicial proceedings in which the agency may become involved, or with respect to the agency's rights and obligations vis-a-vis the Congress and other portions of the executive branch, should not have to be held in public. I know of no instance relating either to private individuals or to collegial bodies in which our society requires legal advice to be furnished and received in public, open to the scrutiny of the potential adversary. These two exceptions, for the consideration of Freedom of Information Act exemption 5 matters and for the discussion of advice of counsel, should certainly be included.

One important change must be made in exemption 9(B) of the present bill. This exemption, which allows the closing of a meeting where the information disclosed would "be likely to significantly frustrate implementation of a proposed agency action," is subject to the exception that it does not apply "where the agency is required

by law to make . . . disclosure prior to taking final agency action on such proposal." This exception rests, it seems to me, upon the false proposition that if the law requires disclosure prior to final agency action, disclosure even at the very outset of the agency deliberations cannot possibly be harmful. That is a *non sequitur*. Not infrequently, for example, market knowledge that an agency is contemplating particular rulemaking action may halt or drastically impair the sale of a particular commodity. Such an effect may be tolerable for the relatively brief period necessary to comply with the public-notice-of-rulemaking provision of the Administrative Procedure Act (5 U.S.C. sec. 553(b)). But it may well be harmful to segments of society and substantially destructive of the agency's regulatory goal if protracted for a period which begins at the time the agency first considers the proposed action. In addition to being harmful, the exception is entirely unnecessary—since, to the extent that a statute requiring prior disclosure is indeed expressive of an understanding that disclosure at any time cannot harm the agency's objectives, the exemption of 9(B) would *ipso facto* not be applicable for the obvious reason that disclosure would not frustrate proposed agency action. This dangerous provision should be eliminated.

There is one more comment I would like to make concerning exemption 9(B). In the Senate bill, there was a provision which would have enabled the closure of meetings during which proposed acquisitions of real property would be discussed—on the theory that disclosure of such plans would drive the cost of the property significantly higher. That provision has been eliminated, and we have no objection to its elimination because we think the situation it addresses is merely one instance of a number of ways in which premature disclosure can "significantly frustrate implementation of a proposed agency action." In other words, we think the situation is already covered by exemption 9(B), which we expect to be interpreted in a reasonable fashion.

EXEMPTION PROCEDURES

Apart from these problems with the scope of the exemptions, agencies will find it exceedingly difficult to comply with all the required procedures for closing and announcing meetings. They are not sufficiently thought through. For example, there is no valid reason why the number of members who are entrusted to take action on behalf of an agency in a meeting cannot be entrusted as well to determine whether such a meeting may be closed pursuant to an exemption. To require—as the bill now does—a majority vote of the entire membership for each such determination would no doubt impede the prompt conduct of agency business, requiring the entire agency to inform itself on matters which it has sought to delegate. Moreover, requiring the vote of the majority of the entire agency either to accelerate a scheduled subcommittee meeting or to change the subject matter of such a meeting may, in an emergency, prevent an agency from acting when there are absentees. And nowhere does the bill specify what procedure should be used to call off a meeting already announced.

The provisions of subsection (d)(3) that agencies publicly list all persons expected to attend closed meetings seems to me highly undesirable as a categorical imperative. It should be obvious that in many cases, in various closely regulated industries, the mere listing of the individuals attending the meeting would effectively disclose its subject. The very interests which justify the creation of the exemptions demand also the creation of an exception to this listing of attendees where such listing would in the opinion of the agency impair the interests which require the meeting to be closed.

It seems to me that the procedure for closing a series of meetings is unnecessarily complicated. Subsection (d)(4) provides substantial relief which would be applicable to a limited number of agencies, but for the rest, subsection (d)(1) requires a separate vote for all of the agency members with respect to each closure, except that a series of portions of meetings extending over a period no longer than 30 days can be closed by a single vote so long as all of the portions involve "the same particular matters." This seems to me an enormous waste of time and thus of the taxpayers' money. There is no conceivable reason why, for example, a regulatory agency should not be able to provide by a single, nonrecurring vote, that all portions of meetings dealing with decisions in formal adjudications under the Administrative Procedure Act involving violations of particular provisions of law shall be closed. The devotion of a little time right now, to refine the provisions of subsection (d)(1) so as to avoid unnecessary repetitive votes on closure can save an enormous amount of time and money in future years.

TRANSCRIPTS

Having expressed concern for the possibility if not probability that H.R. 11656 will be unnecessarily expensive, let me discuss next what is undoubtedly the most wasteful

provision in the bill. Agencies are required by subsection (f) to make transcripts or tape recordings for almost all closed meetings, and to make such transcripts or recordings publicly available to the extent they do not, in the opinion of the agency, by recorded vote taken after the meeting, disclose exempt information. Compliance with this provision will often, if not usually, require a complete review of the transcript of every closed meeting, separate decision by the agency as to which portions are exempt, and an explanation by the agency of the reason for every deletion. This substantial expenditure of the time of the senior officials of the agency is in addition to the cost of transcription which will often be required.

This cumbersome and expensive process has only one purpose: To assure against improper closure of a portion of a meeting which should have been open. One may first ask whether such delux enforcement procedures are essential to assure compliance with the law by high-level public officials sworn to observe it. Having done for 200 years without a Sunshine Act at all, when we finally enact it—and on the basis of no experience which would indicate that it will not be observed in good faith—is it wise to adopt an enforcement mechanism which is so costly? A transcript is not needed to secure judicial review of an improper closure, any more than it is needed to secure judicial review of other improper agency action. Any court can require the agency to supply an affidavit, under oath, as to what was discussed. Moreover, any willfully improper closure will certainly be brought to the public's attention—unless one assumes that each member of the agency is violating his obligation to uphold the law. As far as we can determine, none of the State sunshine statutes have transcript or recording requirements for either open or closed meetings.

There is another evil of the transcript provision which may as well be avoided. It is assuredly not desirable, when dealing with such matters as classified information or unevaluated accusations of criminal activity to have any more records floating about the executive branch than is necessary. Under the bill, these records must be kept for a minimum of two years. It seems to me senseless, particularly in the case of the most sensitive national security information, to have file drawers of this material transcribed and maintained for a purpose as insubstantial as that sought to be achieved by subsection (f). One may safely predict, moreover, that the retention of this volume of recorded material concerning the most confidential agency meetings will produce a fertile source of litigation involving requests for discovery totally unrelated to the Sunshine Act, and will thus increase the expense and retard completion of agency actions.

Let me describe just one of the unending series of actions which the transcript provisions of the present bill, coupled with its meeting requirements, would inevitably produce: If a meeting is closed, a transcript must be made available except for those portions determined to be exempt. To avoid disclosure of such portions of the transcript, the meeting called to discuss the proposed deletions must also be closed. This meeting, of course, would also have to be recorded, and a transcript made available, except for those portions that are exempt. Again, to avoid disclosing such exempt portions of the transcript of the second closed meeting, a third closed meeting might have to be called to consider the proposed deletions stemming from the second meeting. Et ad infinitum.

In place of the transcription and recording requirements, I respectfully urge you to rely, at least for an initial period, upon the good faith of sworn officials of the United States—usually Presidential appointees confirmed by the Senate; and upon the ability of the courts to remedy any abuses without the existence of verbatim transcripts in this field of agency action.

JUDICIAL REVIEW

We have several comments concerning the judicial review portions of the bill, sections (h) through (j). As to section (h): We seriously question the wisdom of enabling any individual, anywhere in the United States, whether or not alleging specific harm, to bring an action in the district where he resides, to enjoin or remedy violation of any of the substantive provisions of the bill. Such a provision fails to recognize the ability of litigation, whether or not justified, to impede and protract administrative activity: It also underestimates the willingness of self-interested individuals to use this device for precisely that purpose.

I realize that a similarly broad provision—allowing venue in the home district and not requiring any showing of personal harm to the plaintiff—was adopted for the Freedom of Information Act. But FOIA litigation in that area cannot have the effect of slowing or halting agency action, whereas the present provision can be used, for example, to enjoin a closed meeting which may be urgently needed. I urge you to reconsider this provision in light of the fact that what it achieves is not the same

thing as the Freedom of Information Act. Rather, it places in private hands, to be used for selfish purposes, a weapon which is potentially much more destructive of our government processes. At the very least, there should be a requirement that the individual seeking relief allege specific harm to his own interests; and venue should lie only in the District of Columbia or the district where the agency's main office is located, so that the case may be handled by the agency with efficiency and dispatch. In addition, injunctive relief which would prevent the holding of a closed meeting should not be available unless the agency has already been adjudged, in an earlier case, guilty of improper closure with respect to the same type of matter. I find it paradoxical that the Congress might be willing to permit gratuitous interventions by any private person or firm into agency actions, thereby halting such actions, but unwilling to trust high-level public officials in the performance of their sworn obligations under law.

Subsection (i) raises a different problem. It would allow any Federal Court which is reviewing agency action pursuant to some other provision of law, to set that action aside on the basis of violation of the provisions of this bill; but it establishes no standard whatever to determine when such judicial relief would be appropriate. There is no reason, it seems to me, to permit a court to use violation of the provisions of this bill as a basis for setting aside agency action unless it is probable the former affected the latter. Otherwise it is left entirely to the courts—and most commonly to the district courts—to decide when an agency action which may be most important to the Nation should be set aside simply because it is the means closest at hand to punish the agency for its impropriety. This notion of setting aside government action not because it may be wrong, but simply because it will teach the government a lesson, has some unhappy parallels in the criminal law field, which I believe we are learning to regret. I urge, therefore, that you add to subsection (i) a proviso that no agency action may be enjoined or set aside by reason of failure to observe the provisions of this bill unless the court finds a probability that such failure affected or would affect the nature of the action.

Finally, in connection with the judicial review provisions, we object to the portion of subsection (j) that permits costs to be assessed against individual agency members rather than against the agency itself or the United States. Such vindictiveness is to my knowledge unprecedented. The ordinary remedy against a public servant who violates the law is his removal or impeachment.

I do not believe it is wise to distort sensitive judgments, concerning such important matters as whether particular national security secrets or particular matters involving personal privacy should be discussed in open session, by the threat of financial liability if (and only if) the vote is to hold a closed meeting. I may add that the provision does not make strict sense, since I can see no way in which an individual agency member can, in the words of the bill, "violate this section." His vote is at most one or two, and usually one of many, which produce the erroneous results.

I urge that this provision be replaced by an agency liability provision similar to that contained in the Freedom of Information Act and the Privacy Act, 5 U.S.C. 552(a) (4)(E), 5 U.S.C. 552a(g)(3)(B).

EX PARTE COMMUNICATIONS

Concerning that portion of the bill dealing with ex parte communications in formal adjudication under the Administrative Procedure Act, it is, of course, desirable to have a clear statutory provision governing such communications; but the difficulty of framing a provision which can apply to all agencies and cover all conceivable situations is considerable. As you know, most major agencies have their own regulations governing this matter, some of which are more strict than this bill. It can be plausibly maintained that the Congress could best require in simple language that all agencies have such regulations and that they be deemed to have the force of law.

Because of the conceptual difficulty in framing the prohibitions so as to have general application, the executive branch would generally prefer to leave the matter to agency resolution. All of the conceptual difficulties have not been eliminated from the present bill, as I believe the testimony of several agencies, including the administrative conference of the United States, has demonstrated and will demonstrate. For example, we have considerable concern about the fact that certain key phrases have not been adequately defined. To illustrate, "interested person," an important phrase or concept, is nowhere described or defined with particularity. Similarly, we note that reasonable persons may differ as to the meaning of the ostensibly significant phrase, "ex parte communication relative to the merits of the proceeding." We think that if the present approach of the bill is to be maintained, more work should be done on definitions, to which end we would offer to the committee and staff our assistance.

CONCLUSION

Mr. Chairman, the Congress and the executive branch are apparently confronted these days with two public demands. The first is for greater openness, fairness and rationality of agency action. The second seeks an end of delay and a reduction in the size and the cost of the bureaucracy. Most of the comments which I have made suggest that in too many respects this bill heeds the first call and ignores the second.

To my mind, it is neither wise nor desirable to enter this new area so as to immediately achieve 100 percent assurance of 100 percent openness at a cost in delay and taxation which is intolerable. It seems the better part of valor to move slowly at first and attempt to reach the desired ends at minimal cost. If that approach proves unworkable—if the senior officials of the covered agencies really cannot be relied upon—there will be time enough later to incur greater expenditures (with, perhaps, concomitant delays and inefficiencies) in order to achieve better implementation of the law. At least initially, however, we urge that you make the few changes I have suggested, which will detract not at all from the principal purpose and thrust of this legislation and, indeed, may appreciably affect its effectiveness. After all, our government has worked tolerably well without this much sunshine for 200 years. Hence, we suggest that a slower and more restrained approach to the goal of openness will pay dividends for the public and the agencies of government affected by H.R. 11656.

Mr. TYLER [continuing]. And from my summary thereof in the next few minutes, we are convinced that some of the present phraseology and draftsmanship are ambiguous and fraught with perils of more expense than we think is necessary and desirable and with the additional perils of perhaps creating unnecessary litigating maneuvers which will only block sensible actions by the agencies affected.

Perhaps these difficulties, Mr. Chairman, which we perceive, are inherent in any legislation which seeks to provide uniform and detailed procedural requirements for the diverse departments and agencies that comprise the executive branch of modern government.

Our reservations, as you will see, relate to the breadth of the coverage of the bill and the ambiguity in its language and its relationship to certain other laws and practices. If I may summarize, I think we are most concerned with the uncertainty as to which agencies and meetings of those agencies are covered, certain exemptions from the open meeting requirements and procedures for using these exemptions, the requirement for maintaining and reviewing verbatim transcripts for all closed meetings and the rather unusual—if not unprecedented—severity of the judicial review provisions.

We think that modifications in these particular areas are necessary to guard against possible injury to the privacy rights of individuals who work or appear before the collegial agencies covered or apparently covered, and the serious impairment of those agencies' abilities to carry out their statutory duties.

Furthermore, certain provisions of the bill, we think, are inconsistent with the principles laid down by the Freedom of Information Act and the Privacy Act. I would like to review, at least briefly, and in some instances, more than briefly, those provisions of H.R. 11656 which we think cause these difficulties and then offer some proposed alternatives which we think would ameliorate the problems which we see.

Let me first, Mr. Chairman, if I may, turn to the problem about covered agencies. As you know, the bill relies upon the definition of "agency" found in the amended Freedom of Information Act. This definition, in turn, is based largely upon that definition of agency found in the Administrative Procedure Act.

Unfortunately, as we see it, neither of these definitions, in those statutes, provide much help or guidance. The FOIA definition of "agency," for example, was designed to include even the smallest entity having the power to act, not just a class of entities with shared collegial characteristics, as the present bill would.

We also point out that the Administrative Procedure Act definition—and by reference, FOIA and the Sunshine definition—are phrased in very broad, general terms as each authority of the Government of the United States.

Unfortunately, this expansive or broad definition of uncertain scope has not been clarified by the courts, which have been called upon so far to determine whether various government entities are "agencies" within the Administrative Procedure Act.

These decisions of the court, such as they may be at the moment, suggest that administrative agencies may be agencies for some, but not for all purposes, depending upon the function that the entity is called upon to perform in a particular context.

Consequently, without extended discussion, let me say and observe here that we think that the agencies listed, for example, on pages 15 and 16 of the Senate report, which nearly all executive branch agencies are using, as for the basis of determining their status under the bill, may not be the only ones which the Congress wants to have subject to openness requirements.

Thus, some collegial agencies will not know whether they must comply with a bill of this kind—which is enacted—and the validity of action taken by these agencies may be in doubt until their status under the bill is litigated in the courts.

This means that there may be numerous costly and time-consuming disputes over coverage. Consequently, we would respectfully suggest that these problems we see here could be avoided by listing in the bill itself those agencies which are precisely intended by the Congress to be covered. This would avoid litigation; it would avoid and prevent unintended coverage; and it would eliminate the possibility of an important agency's important actions being, in effect, held up or enjoined pending resolution of any litigation about coverage.

We would point respectfully to the committee's attention a precedent for this approach, which is to be found in the Government Corporation Act of 1945. There, as here, the government corporations could not be apparently defined in one statutory phrase or two.

Congress recognized this problem and chose to address it—and effectively so, we think—over the ensuing years by using a precise statutory list of just who and what is intended to be covered.

The second point that concerns us, Mr. Chairman, is the definition of "meeting," or put differently, the meetings intended to be covered by this bill. This definition is crucial because under the existing language, there apparently is no meeting to which the bill does not apply.

The present definition states that a meeting consists of deliberations which concern the joint conduct or disposition of agency business. A problem with this approach, as we see it, is that it is, in effect, an *ex post facto* definition or concept. It does not enable a meeting to be clearly identified in advance, even though the most important action required by the bill—that of giving public notice—must, of course, be taken before the meeting occurs.

Obviously, any provision which imposes a prior notice requirement must look to the purpose of the gathering rather than to what, after the fact, is found to have occurred. For this reason, we suggest that the purpose element be made an essential part of the definition of "meeting."

Our suggestion would leave open, of course, the problem of a gathering which, though not called for that purpose, proceeds to dispose of agency business. However, that phase of the problem could and should be handled directly rather than by means of an unrealistic and unworkable definition of "meeting."

Specifically, therefore, we would suggest adding to subsection (b) of the bill a provision to the effect that "members as described in subsection (a)(2) shall not conduct or dispose of agency business at any meeting except at an agency meeting complying with this section.

By the way, I interpret or reinterpret the phrase in the present definition, which reads, "at least the number of individual agency members required to take action on behalf of the agency" to mean the number so required with respect to the agency's business which is the subject of the deliberations.

A nine-member agency, let us say, may have delegated certain relatively unimportant aspects of its business to a subcommittee of three for final resolution. It can be presumed that a meeting of three members at which there is discussed other agency business would not come within the definition. Thus, we suggest that it might be helpful to make that point clear in revising the language of the definition.

We think a few other technical ambiguities exist here. To illustrate, the present definition could literally be construed to cover deliberations through written memorandums, rather than at physical gatherings or physical meetings. Indeed, the word "deliberations" could even be interpreted to cover the thought processes, expressed orally or in writing, of only a single senior agency member.

To remedy these potential problems—if not actual—we suggest that the definition be remanded to read, for example, as follows: "The term 'meeting' means a gathering for the purpose of considering the joint conduct or disposition of agency business of two or more agency members, but at least the number required to take action on behalf of the agency with respect to such business."

Let me turn to another difficulty we see with the bill's current definition of "meeting." That is that that definition is probably broad enough to include all of the meetings an agency might hold for the sole purpose of taking action with respect to the bill's many procedural requirements.

For example, it is presumably a meeting covered by this bill if agency members meet pursuant to subsection (d) to decide whether to close a meeting or if agency members meet pursuant to subsection (e) to determine whether to have a scheduled meeting at an earlier date or to change the time, place, or subject matter of a meeting, or if agency members meet pursuant to subsection (f) to decide which portions of the transcript of a closed meeting are exempt.

Now, since subsections (d) and (e) require that every meeting be preceded by an agency vote on whether to close or open it, as well

as by a public announcement, agencies will be forced to spend time applying these procedures to meetings that are merely held to insure compliance with the bill itself.

Worse: an infinite regression might be set up. A preliminary meeting under subsection (b) to consider whether a subsequent meeting should be open or closed would have to be preceded by what I will call a pre-preliminary meeting to consider whether the preliminary meeting should be opened or closed and ad infinitum, as you can see.

To avoid what might be deemed these absurd results, we respectfully suggest that language be added to the "meeting" definition which simply states something like this: "but does not include gatherings which are called solely to take or consider action necessary to comply with this section."

We think this language is necessary to insure protection of exempt information. Subsection (c) provides that the requirement of subsections (d) and (e) shall not apply to exempt information. But an agency may have to call a meeting which, under the present provision, would have to be opened simply to decide whether information was exempt for purposes of subsections (d) and (e). And, of course, at such a meeting, the information itself would have to be discussed.

Mr. Chairman, let me turn to those exemption provisions which we think have some problems. We think that several changes are called for here in order to preserve the exemptions provided under the Freedom of Information Act, provisions which, as you know, the Congress has already subjected to considerable care and scrutiny.

Surely we understand that the existing bill language seeks, apparently, to track the FOIA exemptions, but we think that the tracking is neither precise nor adequate in several important particulars.

First, the crucial investigation exemption contained in subsection (c)(7) is inadequate as written, in our view, because it talks not to the disclosure of certain investigative information, but only that information when it is in the form of investigatory records, a point which I understood Mr. Lewis, by the by, to be making a few moments earlier.

This phraseology is sufficient in the context of FOIA, of course, where a request can only pertain to recorded information. When transported verbatim into the existing bill, however, it does not protect the full scope of interests which it protects in the FOIA context. A meeting cannot be closed merely because the information it discloses would interfere with law enforcement proceedings or disclose confidential sources or reveal investigative techniques or even endanger the lives of law enforcement personnel.

It is only if and when this information is revealed by means of disclosure of investigatory records that the exemption would apply. This, in our view, is obviously an irrational limitation and should be eliminated. The entire exemptions should be recast so that any disclosure of information of the type described would justify a closed meeting, whether or not the manner of disclosure is through the revelation of investigatory records.

I turn you to another subject, Mr. Chairman, and that is this. The present bill contains no counterpart to exemption 5 of the Freedom of Information Act, which of course, as you well know, is the exemption for interagency or intraagency memorandums, letters, and the like.

Now, to some extent, of course, the very philosophy of this legislation is incompatible with such an exemption, since that philosophy discounts the value of confidentiality and deliberations which that exemption is intended to preserve. But the "Sunshine" philosophy has only been applied to deliberations at the very highest level of the agency—that is, among the members who comprise the collegial body which is at the top of the agency.

Yet observe that the bill, as now written, would also destroy the confidentiality which exemption 5 of FOIA accords to lower level memorandums, whenever those memorandums happen to be discussed at an agency meeting.

Now, in all candor, I must acknowledge that it is very difficult to preserve the one value without losing the other. That is to say, an agency should not be able to evade the open meeting requirement by simply basing its discussion of the particular subject upon a staff memorandum which would be exempt from disclosure under FOIA.

Nevertheless, we think that at least a few reasonable exceptions can be drafted and included here. Let me illustrate. It should be possible to close a meeting which is called for the purpose of discussing whether an FOIA act request for a particular document should be denied on the basis of FOIA exemption 5.

Such a meeting would have to be open and, in effect, reveal the document without more under the existing exemptions in this particular bill. Similarly, an agency meeting for the purpose of considering the advice of counsel with respect to judicial proceedings in which the agency may become involved or in connection with the agency's rights and obligations, vis-a-vis the Congress and other parts of the executive branch, should not have to be held in public.

I know of no instance, at least, relating either to private individuals or to collegial bodies, in which our society has required legal advice to be furnished and received in public open to the scrutiny of potential opponents or adversaries.

These two exceptions—for the consideration of Freedom of Information Act exemption 5 matters and for the discussion of the advice of counsel—we respectfully submit, should be carefully considered for inclusion in this bill in this area.

We point out to the committee's attention another important change which we think ought to be considered and made in exemption 9(b) of the present bill. This is the exemption, of course, which allows the closing of a meeting where the information disclosed would—and I quote—"be likely to significantly frustrate implementation of a proposed agency action."

Now, this is subject to the exception, members of the committee, that it does not apply where the agency is required by law to make disclosure prior to taking final agency action on such proposals.

Thus, this exception rests, it seems, upon the false proposition that if the law requires disclosure prior to final agency action, disclosure, even at the very outset of the agency deliberation, cannot possibly be harmful.

That, we think, is really a *non sequitur*. Frequently, for example, market knowledge that an agency is contemplating particular rulemaking action, let us say, may halt or drastically impair the sale of a particular commodity or security. Such an effect may be tolerable

for the relatively brief period necessary to comply with the public notice of rulemaking provision of the Administrative Procedure Act, but it may well be harmful to segments of society and substantially destructive of the agency's regulatory goal if protracted for a period which begins at the time when the agency first considers the proposed action.

In addition to being potentially harmful, the exception seems to us unnecessary. Since, to the extent that a statute requiring prior disclosure is indeed expressive of an understanding that disclosure at any time cannot harm the agency's objectives, the exemption of 9(b) would *ipso facto* not be applicable for the simple reason that disclosure would not frustrate proposed agency action.

We think this provision is dangerously obfuscatory and it should be eliminated. Let me make one more brief comment about exemption 9(b). You will recall that in the Senate bill here is a provision which would have enabled the closure of meetings during which proposed acquisitions of real property would be discussed, this on the theory that disclosure of such plans could drive the cost of the property in question up on the market list. That provision has been eliminated and we, of course, have no objection to its elimination because we think that the situation it addresses is merely one instance of a number of ways in which premature disclosure can significantly frustrate implementation of a proposed agency action.

In other words, gentlemen of the committee, we think the situation is already covered by exemption 9(b) which we expect and hope can be interpreted in a reasonable fashion. While we are on the subject of exemptions, Mr. Chairman, I would like to talk about certain exemption procedures which we think may be troublesome, if not totally frustrating for certain agencies.

Indeed, we think that the agencies will find some of these procedures inordinately difficult to comply with. They are really not sufficiently thought through at the moment in the present bill.

For example, there is no valid reason, in our judgment, why the number of members who are entrusted to take action on behalf of an agency in a meeting cannot be entrusted as well to determine whether such a meeting should be closed pursuant to an exemption.

To require, as the bill now does, a majority vote of the entire membership for each such determination would almost certainly impede prompt conduct of agency business requiring the entire agency to inform itself on matters which it has sought to disperse delicately.

Moreover, requiring the vote of the majority of the agency either to accelerate a scheduled subcommittee meeting or to change the subject matter of such a meeting may, in a crunch, prevent an agency from acting when there are absentees due to illness or other reasons. And nowhere does this bill specify what procedures should be used to call off a meeting already announced.

The provisions of subsection (d)(3) that agencies publicly list all persons expected to attend closed meetings, seems to us undesirable, at least as laid out as it now is—as a categorical imperative.

Surely in many cases in various closely-regulated industries, mere listing of the individuals or firms attending the meeting would effectively come close to disclosing the subject matter of that meeting.

The very interests which justify the creation of the exemptions demands also the creation of an exception to this listing of attendees where such listing would, in the judgment of the agency in question, impair the interests which require the meetings to be closed.

Furthermore, we would argue that the procedure for closing a series of meetings is unnecessarily complicated, requiring, if I may say so, the skills of the famous Philadelphia lawyer standing on his head to understand. Subsection (b)(4), for example, provides substantial relief which would be applicable to a limited number of agencies, but for the rest, subsection (d)(1) requires a separate vote for all of the agency members with respect to each closure, except that a series of portions of meetings extending over a period of no longer than 30 days can be closed by a single vote, so long as all of the portions involve "the same particular matter."

We think this really a serious waste of time and of money. We think there is no good reason why, for example, a regulatory agency should not be able to provide, by a single nonrecurring vote, that all portions of meetings dealing with decisions in formal adjudications under APA involving violations of particular provisions of law shall be closed.

We think that the devotion of a little more time and effort to drafting here will refine the provisions of subsection (d)(1) so as to avoid unnecessary repetitive votes on closure and a concomitant enormous amount of time and money in the future.

Mr. Chairman, I'd like to turn as swiftly as possible to the transcript provisions in the bill. We have already expressed concern about unnecessary expenses under the present draft. Let me turn to the transcripts which we think may be the most wasteful of all provisions in the bill as now written.

As you know, agencies are required here by subsection (f) to make transcripts or tape recordings for almost all closed meetings and to make such transcripts or recordings publicly available to the extent that they do not, in the opinion of the agency, disclose exempt information.

Compliance with this provision will often, if not most usually, require a complete review of the transcript of every closed meeting, separate decision by the agencies as to which portions are exempt, and an explanation by the agency for the reason of every deletion.

This is a lot of time. I know you've heard evidence that the bill will not be very expensive and time consuming. We think this is a good example of why this may not be so. Now, as we read the bill, this cumbersome and potentially expensive procedure has only one purpose: to assure against improper closure of a portion of a meeting which should have been opened.

One may sensibly ask whether such complicated and deluxe enforcement procedures are essential to insure compliance with the law by high level persons—that is, public officials—sworn to observe the law. Having done in this country for some 200 years without any kind of Sunshine law, when we finally enact one and on the basis of no experience which would indicate that it will not be observed in good faith, we ask: "Is it really wise to adopt an enforcement mechanism which is so cumbersome and expensive?"

I point out that in the courts a transcript is not needed to secure judicial review of an improper closure of an agency meeting, any more than it is needed to seek judicial review of other improper agency action—that is, the merits.

As you know, any court can and usually does require an agency of the United States to supply an affidavit as to what was discussed at a pertinent meeting. Moreover, any willfully improper closure will certainly be brought to the public's attention, unless one assumes that each member of the agency is violating his obligation sworn to uphold the law. And I might add, that so far as my and my colleagues' study show, none of the several States' Sunshine statutes of the moment have transcript or recording requirements for either open or closed meetings.

We see another peril in the transcript provision which we think can be avoided and should be. Surely it is not desirable when dealing with such matters as classified information or unevaluated accusations of criminal activity, to have any more records floating about the executive branch than is necessary.

Now, under the bill, records of this kind must be kept for a minimum of 2 years. It seems to us senseless, particularly in regard to sensitive security information and the like, to have file drawers of this material transcribed and maintained for a purpose as relatively insubstantial as that sought to be achieved by subsection (f).

I might add that given the habits of litigation in our Republic, the retention of this kind of material will produce a fertile source of litigation involving requests for discovery having nothing to do with an appropriate Sunshine Act. And this, alone, if true, will increase the expense and retard the completion of statutory agency actions.

Let me just simply spell out or transcribe one possible series of actions which the transcript provisions, as they are now written, would produce. If you assume that a meeting is closed, a transcript must be made available, except for those portions determined to be exempt. To avoid disclosures of such portions of the transcript, the meeting called to discuss the proposed deletions must also be closed.

This meeting, of course, would also have to be recorded and a transcript made available, except for those portions that are exempt. Again, to avoid disclosing such exempt portions of the transcript of the second closed meeting, a third closed meeting might have to be called to consider the proposed deletions stemming from the second meeting, and so forth, ad infinitum.

Now, in place of the transcription and recording requirements, we respectfully urge you to rely for at least for an initial period upon the good faith of sworn officials of these agencies, who usually are Presidential appointees, confirmed by the Senate, and upon the ability of the courts to remedy any abuses without the existence of verbatim transcripts in this field of agency action.

Mr. Chairman, I would like to turn to the judicial review segments of this bill. These most importantly are sections (h) through (j). As to section (h) we seriously question the wisdom of enabling any individual, anywhere in this country, whether or not alleging specific harm to him, to bring an action in the district where he resides to enjoin or remedy violation of any of the substantive provisions of this bill.

I fear that such a provision fails to recognize the ingenuity and unending litigative efforts, particularly of lawyers who are seeking to advance some self-interest of themselves or of their clients.

I don't like to speak badly about my profession, but I have to say that there is considerable evidence on the record of just this kind of activity in other areas. Now, I recognize, Mr. Chairman, that a similarly broad provision—that is to say, one allowing venue in the home district and not requiring any showing of personal harm to the plaintiff or, if you will, to the requester—was adopted for FOIA.

But we all know—and this is a significant difference—FOIA litigation cannot have the effect of slowing or halting agency action, whereas here in this bill, the present provision could be used to enjoin a closed meeting which may be very urgent in order to transact highly important public business.

I would urge this committee to reconsider this proposal, in light of the fact that what it is apparently designed to achieve is not the same thing as the Freedom of Information Act. Rather it places in private hands, to be used for selfish purposes, a weapon which is potentially much more destructive of our government process.

Therefore, at the very least we would suggest a requirement that the individual seeking relief allege specific harm to him or his interests. We urge that venue should only lie in the District of Columbia or the district where the agency's main office is located, so that the case may be handled with efficiency and minimization of expense.

In addition, injunctive relief which would prevent the holding of a closed meeting should not be available unless the agency has already been adjudged in an earlier case guilty of improper closure with respect to the same type of matter.

Now, subsection (i) raises different problems. It would allow any Federal court which is reviewing agency action pursuant to some other provision of law to set that action aside on the basis of violation of the provisions of this bill. But it establishes no standard whatsoever to determine when such judicial relief would be appropriate.

In our view, there seems to be no good reason to permit a court to use violation of the provisions of this bill as a basis for setting aside agency action unless it is likely the former affected the latter. Otherwise, it is left entirely to the courts, and this means really practically the district courts, to decide when an agency action which may be important to the Nation should be set aside simply because it is the means closest at hand to punish the agency for its procedural impropriety.

This notion of setting aside important government action—not because it may be wrong on the merits, but simply because it will teach the agency a lesson—has some unhappy parallels in the criminal law field, which I believe we are already learning to regret.

I respectfully suggest to the committee, therefore, that it add to subsection (i) a proviso that no agency action may be enjoined or set aside by reason simply of failure to observe the provisions of this bill unless the court finds a probability that such failure affected or would reasonably affect the nature of that action.

Now, finally I turn to those portions of the judicial review provisions which permit costs to be assessed against individual agency members,

rather than against the agency itself or the United States. This approach, it seems to me, is unusually harsh.

Ordinarily, in the years past, as we know, the remedy against a public servant who violates the law is removal or impeachment. But we do not think it's wise to distort the sensitive judgments concerning such important matters as whether particular national security secrets, for example, or personal private matters should be discussed in open session by the threat of financial liability, if and only if the vote is to hold a closed meeting.

Indeed, I would add that the provision really doesn't make much sense, since I can see no way in which an individual agency member can, in the words of the bill, strictly speaking, violate this section. His vote is at most one of two and usually one of many which produces the results said to be erroneous.

Respectfully, the Department and I commend to your deliberations this proposition: that this provision be replaced by an agency liability provision similar to that contained in FOIA and the Privacy Act.

Now, finally, Mr. Chairman, I turn to the section dealing with ex parte communications. We recognize that this committee and other committees have worked very hard about this. It is, of course, desirable, we think, to have a clear statutory provision governing ex parte communications.

But the difficulty, of course, in framing such a provision, which can apply to all of the myriad agencies covered by this bill and all of the conceivable situations in which those agencies will find themselves, is a considerable task.

Now, as you know, most major agencies today have their own regulations governing this problem. Some of these are more strict than this bill, by the way. Thus, it could be plausibly maintained that the Congress could best require in simple language that all agencies have such regulations and that they be deemed to have the force of law.

Now, turning to the present bill as drafted, we would submit that all of the conceptual difficulties—although there have been improvements in the legislation process—have not been finally eliminated. As I understand it, the testimony of several agencies, including the Administrative Conference of the United States, which, by the by, I happen to be Vice Chairman of at the moment, has demonstrated and will demonstrate.

For our part, we have considerable concern about the fact that certain key phrases have not been adequately defined. To illustrate, "interested person," an important phrase or concept here, is nowhere described or defined with particularity as I read the present bill.

Similarly, I would note that reasonable persons may differ as to the meaning of the ostensibly significant phrase, "ex parte communication relative to the merits of the proceeding." Just to simply give you one illustration parenthetically of what I mean, does this mean, for example, a situation where a lawyer in the Antitrust Division of the Department of Justice might call up somebody in Mr. Lewis' office of the Federal Trade Commission and discuss a recent decision which, in the judgment of our Antitrust Division lawyer, might affect a matter which was before the members of the FTC at moment?

We think that if the present approach of the bill is to be maintained, more work should be done on the definitions to which end we would offer to the committee and to its staff our assistance.

Now, finally, Mr. Chairman, I know I have taken a great deal of your time, for which I apologize, I would like to conclude by pointing out that, of course, the Congress is confronted these days with two public or apparently two public demands. The first is for greater openness, fairness and rationality of the actions of our many government agencies. The second public demand seeks an end of delay in reduction in the size and the cost of the bureaucracies which are involved.

It could be urged here that the bill, as presently drafted, heeds too much the first demand and ignores too much the second. But in any case, I would respectfully suggest to this committee that it is neither wise nor desirable to enter into this new area with the hope or expectation that we can immediately achieve 100 percent assurance of 100 percent openness or sunshine.

We think that if we try to do that that the costs and the delay and the expense will be intolerable. We think that the better part of valor is to move slowly at first and to attempt to reach the desired ends of this bill at a minimal cost.

At least initially, therefore, we urge that you make the few changes that we have suggested in this testimony this morning. We think that these changes will really not detract at all from the principal goal of this legislation and, indeed, may appreciably affect its effectiveness.

After all, our government has worked tolerably well without this much sunshine for quite a few years. Hence, we do not think it irrational to submit that a slower and restrained approach to the goal of openness will pay dividends.

Thank you, Mr. Chairman.

Mr. FLOWERS. Thank you, General. I think you've effectively commented on many of the areas of concern that the staff and I have seen in the legislation and matters into which we wanted to inquire. And we appreciate your testimony thereupon.

I don't have any specific questions. I think that as we get into our own recommendations as to maybe changes in drafting that we will ask our staff to communicate with your office and they will be in touch.

Mr. Moorhead, do you have any questions of the Deputy Attorney General?

Mr. MOORHEAD. I want to join in thanking you for being here today. This is important legislation and we are interested in seeing that we don't do anything that would be more harmful than it is beneficial.

Do you feel that an argument can be made that the Council of Economic Advisors, the National Security Council, the Council on Environmental Quality, the Joint Chiefs of Staff, and so forth, are included within the coverage of this bill?

Mr. TYLER. I'm sorry, Mr. Moorhead. Do I feel that it would be wise to include such—

Mr. MOORHEAD. No; do you think the bill could be interpreted, under any circumstances, that they would be covered by the bill?

Mr. TYLER. I think as presently drafted we would be concerned about that possibility. That's the reason why we would suggest going to the approach of the Government Corporations Act of some 30 years ago or so. And then all doubts of this kind could be simply eradicated. And more than that, if we assume that certain existing agencies be phased out or that we assume that others be added, it would be a much clearer and better way so that the Congress would have a crack at deciding, at any given time, who precisely should be included in the ambit of this statute.

Mr. MOORHEAD. There's no way that this legislation would adversely affect the operation of the Department of Justice; would it?

Mr. TYLER. No; we don't consider it to apply, as written, to the Department. We'd like to suggest that we appear here with reasonable objectiveness for that reason.

Mr. MOORHEAD. Well, we appreciate very much your testimony here and we will look very closely at the suggestions you have made.

Mr. FLOWERS. Mr. Scalia, do you have any comments you'd like to make?

Mr. SCALIA. No, sir, I just second what my boss has said and maybe just reemphasize the thought that I guess like any piece of legislation this one involves some balancing of interests. We don't disagree with the interest of openness, but we think at least initially it would be wise to seek to achieve that in a manner that doesn't impair too much the other interests of efficiency and frugality on the part of the agencies. I think the principal problems addressed by most of the Deputy Attorney General's comments have been with respect to not the principles of the act—not with respect to what must be open and what must be closed. Most of them have gone to either erroneous descriptions of what was intended or, most important, to the enforcement mechanisms.

I think the enforcement mechanisms—in particular, the transcript provision—are just massive. And I just think it is imprudent to assume the need for such massive enforcement provisions until you have some experience to go by. Maybe one day you'll decide they are necessary.

But to impose that kind of cost and that kind of inefficiency at the outset seems to me a little hasty and rash.

Mr. FLOWERS. We thank you for your comments and look forward to seeing both of you gentlemen again in the future and we'll ask the staff to communicate with you as we develop our position on the legislation.

Thank you very much.

[Whereupon, at 12:03 p.m., the subcommittee adjourned, subject to the call of the Chair.]